

# **AN IMMANENT CRITIQUE OF THE AFRICAN HUMAN RIGHTS SYSTEM: THEORY, PRACTICE, AND REFORMS**

**By**

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## **ABSTRACT**

This thesis is an immanent critique of the African human rights system. It, therefore, examines the practice of human rights as set by the African people as opposed to purely external transcendental forms of critique. This is carried out by studying the theory of the African regional human rights system as presented in the African Charter on Human and Peoples' Rights 1986, and then evaluating the practice to determine its consistency with the theory of rights contained in the Charter. Evaluation of the practice is achieved through necessary references to State Reports, Concluding Observations, NGO statements and rapporteur reports. Further assessments on the consistency between the theory and practice of such rights take into consideration the practicality of the normative standards as well as the challenges of implementation. As an immanent critique, the research evaluates identified discrepancies and tensions between theory and practice with the aim of ideally resolving these through proposed policy and other reforms. The originality of the research is hinged on the adopted approach which affords a holistic assessment of the African human rights system. This translates into concrete findings on the actual practice of the Charter and informed reform proposals based upon a thorough critical evaluation of these findings. The research, therefore, makes a case for an assessment of human rights in Africa based on the continent's internal standards as represented by the African Charter. It is shown, through this approach, that there are a number of discrepancies between theory and practice such that the regional system often, wholly or partially, fails in its implementation of human rights even when its actions are assessed by distinctly African standards.

It is argued that these theory/practice discrepancies are occasioned by three convergent challenges namely the lack of adequate cooperation from member states, practical socio-economic and cultural challenges, and institutional ineffectiveness. The research argues that, unless these challenges are adequately addressed, the practice of human rights in the continent will continue to fall short of the expectations generated by the African Charter.

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## ACRONYMS

AHRLJ	African Human Rights Law Journal
AHRLR	African Human Rights Law Report
AJICL	African Journal of International and Comparative Law
AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
AMLR	Ave Maria Law Review
APSR	American Political Science Review
ASICL	Annual Survey of International and Comparative Law
AYBIL	African Yearbook of International Law
BHRLR	Buffalo Human Rights Law Review
BIP	Brookings Institution Press
BJIL	Brooklyn Journal of International Law
CILJ	Cornell International Law Journal
CSRC	Crisis States Research Centre
CP	Clarendon Press
CUP	Cambridge University Press
CRISPP	Critical Review of International Social and Political Philosophy
DUP	Duke University Press
EAJPHR	East African Journal of Peace and Human Rights
ESILCPS	European Society of International Law Conference Paper Series

FILJ	Fordham International Law Journal
GJICL	Georgia Journal of International and Comparative Law
GP	Greenwood Press
GWILR	George Washington International Law Review
HRLR	Human Rights Law Review
HRQ	Human Rights Quarterly
HWLJ	Harvard Women's Law Journal
IAEHRJ	Inter-American and European Human Rights Journal
IB	Interights Bulletin
IICLR	Indiana International and Comparative Law Review
IJCR	International Journal of Children Rights
IPSR	International Political Science Review
ISQ	International Studies Quarterly
JAIL	Journal of African and International Law
JEAS	Journal of Eastern African Studies
JIWS	Journal of International Women's Studies
JPAS	The Journal of Pan African Studies
LAP	LawAfrica Publishing
LB	Lexington Books
NCLR	Nigerian Constitutional Law Reports
NQHR	Netherlands Quarterly of Human Rights
NIALS JLD	Nigerian Institute of Advanced Legal Studies – Journal of Law and Development

NILR:	Netherlands International Law Review
NZLR	New Zealand Law Review
OUP	Oxford University Press
PEL	Pearson Education Limited
PSLR	Pennsylvania State Law Review
PULP	Pretoria University Law Press
SADCLJ	Southern African Development Community Journal
SCJIL	Santa Clara Journal of International Law
SJILC	Syracuse Journal of International Law and Commerce
SLS	Social and Legal Studies
SP	SAGE Publications
UCLHRR	University College London Human Rights Review
ULR	Utah Law Review
UMP	University of Minnesota Press
UPP	University of Pennsylvania Press
UTLR	The University of Tasmania Law Review
UVP	University of Virginia Press
VJIL	Virginia Journal of International Law
WFLR	Wake Forest Law Review
WD	World Development
YHRDLJ	Yale Human Rights and Development Law Journal

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## CHAPTER 1

### 1 INTRODUCTION

#### 1.1 Introductory Remarks

The issue of human rights in Africa continues to attract regional and global attention. This is unsurprising given the recent history of the continent, a history replete with wars, poverty, and oppressive governments—situations that persist in quite a few African countries. Interestingly, the several reports and assessments have drawn relatively little attention to the continent’s regional human rights framework—a reasonably developed system with normative and institutional structures. Following egregious human rights violations by brutal regimes in the early aftermath of independence, African leaders decided to draw up a human rights Charter for the continent in the form of the African Charter on Human and Peoples’ Rights<sup>1</sup> (‘the African Charter’ or ‘the Charter’). This Charter not only set out normative human rights principles for the continent but also created an institutional framework for monitoring and promoting compliance with these norms. This was in the form of the African Commission on Human and Peoples’ Rights (‘the Commission’), later to be joined by the African Court on Human and Peoples’ Rights (‘the African Court’ or ‘the Court’) which was created through a subsequent Protocol.<sup>2</sup> The normative framework was not left behind in development. In 2003, member states adopted the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa<sup>3</sup> (‘the Women’s Protocol’)—a Protocol that further substantiates the

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<sup>1</sup> Adopted on 27 June 1981. OAU Doc. CAB/LEG/67/3 rev. 5; (1982).

<sup>2</sup> Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997).

<sup>3</sup> CAB/LEG/66.6 2000.

rights provided in the Charter, this time with respect to women. Other similar human rights instruments were adopted at the continental level.<sup>4</sup>

This thesis is a critique of this regional system and an evaluation of the practice of human rights based on the internal criteria and standards established under the system. In this way, this research differs from other works that adopt external and transcendent forms of critique or standards in evaluating the African human rights system. The aim of the research, therefore, is to evaluate the operation of the African Charter both by the member states and relevant institutional machinery to determine whether the system fails on its own standards. Furthermore, the reasons for such failure would be extrapolated and analysed with the aim of resolving the discrepancies between the theory and practice.

This introductory chapter gives a brief overview of the topic and literature in the field as well as the relevance of the research. Thereafter, it proceeds to explain the methodology adopted and how it facilitates the resolution of the research aims. Overall, it is argued that the adoption of immanent critique would strengthen the theoretical and analytical dimensions of the concept of human rights in Africa as well as a proper evaluation of its implementation.

## **1.2 Overview of Literature**

The promotion of human rights in Africa, and by extension the development of the African regional human rights system, has been the subject of several texts and articles both at the academic and journalistic levels.<sup>5</sup> This subject of human rights in Africa has

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<sup>4</sup> For instance, African Youth Charter adopted in 2006 and the African Charter on the Rights and Welfare of the Child adopted in 1990.

<sup>5</sup> See for instance Victor Dankwa, 'The Promotional Role of the African Commission on Human and People's Rights' (2002) in Malcolm Evans and Rachel Murray (eds) *The African Charter on Human and*

gradually developed since the beginning of the post-independence era leading to the drafting of the African Charter and even beyond to the creation of an African Court. Accordingly, there has been a substantial amount of literature on the issue of human rights in Africa throughout this period chronicling the major developments in the system. A major part of this literature are media and NGO reports<sup>6</sup> on the perceived state of human rights in the continent. This class of literature is mainly expository and seeks to draw attention at the national and global levels to systemic and other violations of human rights. On the other side of the spectrum are academic literature offering critiques, opinions, and recommendations for improving the state of human rights in Africa. Contributions here have also been varied. Some of the literature have focused on specific rights of groups, for example, women and children, with others focusing on specific countries or regions.<sup>7</sup> However, a few others have focussed on the regional protection of rights as envisaged under the African Charter.<sup>8</sup> It is this latter group that this review is most concerned about.

### **1.2.1 Literature on the Regional Protection of Rights**

There have been works which have, at least separately and in bits, examined the theory of the Charter and implementation of some of its provisions. In the former group are the set of early writings, in the aftermath of the Charter, that focus on the theoretical and conceptual notions of 'African human rights' and, by extension, the suitability of the

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People's Rights: The System in Practice, 1986–2000 (CUP 2002) 352; Issa Shivji, *The Concept of Human Rights in Africa* (CBS 1989); Christopher Mbazira, 'Enforcing the Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights: Twenty Years of Redundancy, Progression and Significant Strides' (2006) 6 AHRLJ 333; George Mugwanya, 'Realising International Human Rights Norms through Regional Human Rights Mechanisms: Reinvigorating the African System' (2000) 10 IICLR 35.

<sup>6</sup> For example, reports of Amnesty International, Human Rights Watch and US Department of States.

<sup>7</sup> See for instance Angela Banks, 'CEDAW, Compliance and Custom: Human Rights Enforcement in Sub-Saharan Africa' (2009) 32 FILJ 781; Dejo Olowu, 'Protecting Children's Rights in Africa: A Critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 IJCR 127; Raylene Keightley, 'The Challenges of Litigating Socio-Economic Rights in South Africa' (2011) NZLR 295.

<sup>8</sup> This group addresses issues on the African Commission and Court. See for instance George Mugwanya, 'Realising International Human Rights Norms through Regional Human Rights Mechanisms: Reinvigorating the African System' (2000) 10 IICLR 35; Victor Dankwa, 'The Promotional Role of the African Commission on Human and Peoples' Rights' (2002) in Malcolm Evans and Rachel Murray (eds) *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2000* (CUP 2002) 352.

Charter as representing or embodying these rights. The conclusions have usually been mixed ranging from outright acceptance to rejection of the Charter as adequately playing this role. These discussions have invariably engaged such issues as the universality of rights and cultural relativism. This 'Universalism-Cultural Relativism' debate proceeds on the assumption that the legitimacy of international human rights law depends on the existence of fundamental principles of justice that transcend culture, society, and politics.<sup>9</sup> Universalists, strongly represented by writers like Howard,<sup>10</sup> argue that the contents of human rights are universal and apply to every person irrespective of culture. Thus, these rights accrue to a person by virtue of his or her existence as a human being. The United Nations Declaration on Human Rights is seen as a template of these universal rights. On the converse side are the cultural relativists who argue that the purported universal rights are only products of Western culture bordering mainly on a liberal ideology.<sup>11</sup> They argue that the cultural peculiarities of diverse regions must be respected. The arguments on both sides have often appeared rigid with the focus often shifting to the imperialistic undertones of one part of the argument. A representative of the relativist school, Mutua argues that human rights and Western liberal democracy are virtually tautological and that the former is, in fact, the universalised version of the other. Thus human rights represent the attempted diffusion and further development at the international level of the liberal political tradition.<sup>12</sup> Within the African context, the main issue for this group of writers was whether the African Charter was adequately suited to Africa's peculiar situation and values. On his part, Shivji criticised the African Charter as bearing the birthmarks of neo-colonialism.<sup>13</sup> For him, the African Charter was a product of a flawed 'dominant' ideology and was merely an attempt by African leaders to salvage their credibility especially

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<sup>9</sup> Guyora Binder, 'Cultural Relativism and Cultural Imperialism in Human Rights Law' (1999) 5 BHRLR 211.

<sup>10</sup> See Rhoda Howard, 'Evaluating Human Rights in Africa: Some Problems of Implicit Comparisons' (1984) HRQ 160; Rhoda Howard and Jack Donnelly, 'Human Dignity, Human Rights, and Political Regimes' (1986) 80(3) AMSR 801.

<sup>11</sup> See for instance Makau Mutua, 'The ideology of Human Rights' (1996) 36 VJIL 592; Issa Shivji, *The Concept of Human Rights in Africa* (CBS 1989).

<sup>12</sup> Makau Mutua, 'The Ideology of Human Rights' (n 11).

<sup>13</sup> Shivji (n 5).



before the West. He argued instead for a system suited to Africa's history rather than 'an uncritical acceptance of Western liberal conceptions.'<sup>14</sup> However, despite the Charter's obvious reference to the Universal Declaration of Human Rights ('Universal Declaration'), which in Shivji's view constitutes an uncritical acceptance of Western liberal conceptions, some writers still view the Charter as representing an African concept of rights. For instance, Okere notes that despite its Universalist leanings, the African Charter has specific characteristics whose inspiration derive solely from Africa's colonial history, philosophy of law, and conception of man. He defines this African conception of man as not that of an isolated and abstract individual but an integral member of a group animated by a spirit of solidarity.<sup>15</sup> Mbazira<sup>16</sup> has also pointed out an obvious desire by the drafters of the Charter to produce an 'exclusively' and 'distinctly' African instrument through the distinct approach to socio-economic rights which, unlike in other similar instruments, are not expressly made subject to the available resources of a member state.

Universalist leanings have also influenced some criticisms of the contents of the Charter. Often based on the content of the Universal Declaration or other regional instruments, some writers have identified loopholes in the Charter such as 'inadequate' provisions for civil and political rights<sup>17</sup>. Some of these loopholes, it has been argued, necessitate the revision of some parts of the Charter.<sup>18</sup> However, there are others who argue that,

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<sup>14</sup> *ibid* 20.

<sup>15</sup> Obinna Okere, 'The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems' (1984) 2 HRQ 141, 148.

<sup>16</sup> Christopher Mbazira, 'Enforcing the Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights: Twenty Years of Redundancy, Progression and Significant Strides' (2006) 6 AHRLJ 333, 342.

<sup>17</sup> For instance, Heyns argues that crucial aspects of a fair trial like the right to public hearing, the right to interpretation, the right against self-incrimination and the right against double jeopardy need to have been included. See Christof Heyns, 'African Regional Human Rights System: The African Charter' (2003) 108 Pennsylvania State Law Review 679. The non-provision for the 'right to vote' has also been identified. Isanga points out, with respect to freedom of expression or speech, that African Charter, unlike other comparable international human rights instruments, does not define the individual's right to information and his or her right to freely express and disseminate his or her opinions. See Joseph Isanga, 'Foundations of Human Rights and Development: A Critique of African Human Rights Instruments' (2013) 11 AMLR 123.

<sup>18</sup> Heyns (n 17), Isanga (n 17).

rather than creating and amending treaties, the focus should be on the issue of practice and implementation of the system. For instance, Odinkalu asserts that the shortcomings of the African regional system 'are mostly practical and political matters to which treaties are, to put it bluntly, irrelevant.'<sup>19</sup> Similarly, Mugwanya states that the 'most pressing problem is the implementation of these norms at the 'grass roots' and making them meaningful in people's lives.'<sup>20</sup> The latter set of opinions invariably leads to the second group of works that examine the implementation of rights in the continent. Part of this examination is done vis-à-vis the Charter's institutional structures and their impact on the protection of human rights in the continent. Thus this latter group follows the institutional development of the African human rights machinery from the Commission to the Court through to the proposed merger forming the African Court of Justice and Human Rights with a criminal chamber.

With regard to the Commission, the earliest view coming after the drafting of the Charter was that the Commission's decisions did not have binding force.<sup>21</sup> These arguments were based on the language of the Charter and the general disregard by member states of final decisions of the Commission. It was opined that the Commission, as structured and mandated under the Charter, was merely a committee making recommendations to the Assembly of Heads of State and Government. It was seen as largely ineffectual<sup>22</sup> with its recommendations merely urging states to comply with its directives.<sup>23</sup> Thus, in the words of one writer, 'the Charter remedy [was] ineffective and there [was] in fact, no remedy within the Charter'.<sup>24</sup> There was, therefore, a strong need

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<sup>19</sup> Chidi Odinkalu, 'The Role of Case and Complaints Procedures in the Reform of the African Regional Human Rights System' (2001) 2 AHRLJ 225, 244.

<sup>20</sup> George Mugwanya, 'Realising International Human Rights Norms through Regional Human Rights Mechanisms: Reinvigorating the African System' (2000) 10 IICLR 35, 39.

<sup>21</sup> See Obinna Okere (n 15) 141; Makau Mutua, 'The African Human Rights Court: A Two-legged Stool?' (1999) 29 HRQ 342, Heyns (n 10); Vincent Nmeihelle, 'Toward an African Court of Human Rights: Structuring and the Court' (2000) 6 ASICL 27; Frans Viljoen, 'A Human Rights Court for Africa, and Africans' (2004) 30 BJIL 1.

<sup>22</sup> Mutua, 'The African Human Rights Court' (n 21) 351.

<sup>23</sup> Heyns (n 17) 698.

<sup>24</sup> Nmeihelle (n 21) 39.

to create a system that would compel states to comply with their human rights obligations.<sup>25</sup>

This common position among writers led to clamours for the creation of a court with judicial and binding authority. Such was the support for a court that there is hardly any academic article in clear opposition to its creation. In voicing the need for a court, some commentators appeared to question the significance of the Commission. It was believed that the Court would fill the huge void left by the Commission. For instance, Mutua stated:

The African Human Rights Court is a potentially significant development in the protection of rights on a continent that has been plagued with serious human rights violations since colonial rule. The problems of the African human rights system, including the normative weaknesses in the African Charter and the general impotence of its implementing body, the African Commission, may now be addressed effectively and resolved by the establishment of this new adjudicatory body.<sup>26</sup>

In a similar vein, Baderin expressed optimism on the coming into force of the Protocol as 'an important landmark that [would] hopefully strengthen the enforcement of human rights under the African system.'<sup>27</sup> It was believed, in some quarters, that the mere existence of a Court would generate greater media interest and exposure and a much clearer identity in the minds of Africans.<sup>28</sup> Also, the 'psychological effect' of an international court's judgment on a state would be 'critical'.<sup>29</sup>

Interestingly, there are fewer academic articles in recent times on the actual working of the Court and how it has lived up to its high expectations. The main available materials

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<sup>25</sup> See generally, Makau Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1995) 35 VJIL 339; Henry Steiner and Phillip Alston, *International Human Rights in Context: Law, and Morals* (1996) 689; Phillip Amoah, 'The African Charter on Human and Peoples' Rights: An Effective Weapon for Human Rights?' (1992) 4 AJICL.

<sup>26</sup> Mutua, 'The African Human Rights Court' (n 21) 353.

<sup>27</sup> Mashood Baderin, 'Recent Developments in the African Regional Human Rights System' (2005) 5(1) HRLR 117, 140.

<sup>28</sup> See Viljoen, 'A Human Rights Court for Africa and Africans' (n 21) 22.

<sup>29</sup> Nmehielle (n 21).

are in the form of Activity Reports of the Court and Concluding Observations of the Commission both of which point out the reluctance of states to make the declaration under Article 34(6) of the African Court Protocol allowing individuals and NGOs to bring cases before the Court. Commentators<sup>30</sup> have also identified the need for the Commission to refer cases to the Court to ameliorate the challenge of the dearth of cases in the latter. These recent works appear to correct the misguided high expectations of the Court which some writers<sup>31</sup> had opined should completely take over the protective mandate under the Charter rather than complementing the Commission in that regard. Viljoen points out that such calls were both ‘premature and questionable’ as the Commission remains ‘the only mechanism of redress’ for many individuals under the regional system.<sup>32</sup>

Ironically, the discourse appears to have shifted back to the Commission. Some works<sup>33</sup> have examined the identified weakness of implementation and enforcement of decisions associated with the Commission. These articles have followed a trend—identifying the lack of implementation of decisions of the Commission after the communications process as among the chief obstacles to the regional system, discussing reasons for non-implementation of these decisions, and proposing the establishment of an effective follow-up procedure on the implementation of these decisions. One of the first works in this regard was Viljoen and Louw<sup>34</sup> which sought to measure state compliance with decisions of the Commission. The writers argued for a fully developed and effectively functional follow-up mechanism in the secretariat of the Commission,

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<sup>30</sup> Simon Weldehaimanot, ‘Unlocking the African Court of Justice and Human Rights’ (2009) 2(2) JAIL 167; Frans Viljoen, *International Human Rights Law in Africa* (OUP 2012) 282, Joseph Isanga, ‘The Constitutive Act of the African Union, African Courts and the Protection of Human Rights: New Dispensation?’ (2013) 11 SCJIL 301.

<sup>31</sup> Mutua (n 21); Nmehielle (n 21).

<sup>32</sup> Viljoen, *International Human Rights Law in Africa* (n 30).

<sup>33</sup> Frans Viljoen and Lorette Louw, ‘State Compliance with the Recommendations of the African Commission on Human and Peoples’ Rights’ (2006) 101 AJIL 11; George Wachira and Abiola Ayinla, ‘Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples’ Rights: A possible remedy’ (2006) 6 AHRLJ 465; Rachel Murray and Elizabeth Mottershaw, ‘Mechanisms for the Implementation of Decisions of the African Commission on Human and Peoples’ Rights’ (2014) 36(2) HRQ 349.

<sup>34</sup> Viljoen and Louw (n 33) 22.

the consistent integration of follow-up activities into the Commission's mandate, and the appointment of a special rapporteur on follow-up. This position was forcefully reasserted by Wachira<sup>35</sup> who argued for an institutionalised follow-up mechanism to encourage and monitor compliance with the Commission's decisions on communications. Murray and Mottershaw<sup>36</sup> join the discussion by adding that the African Commission, when ruling on a particular case, could require a state to put in place a mechanism or system that could be employed in the future and to identify the relevant government departments or ministries responsible for its implementation.

The shift to analyses of the Commission is arguably a tacit concession of the Court's failure to live up to its initial hype, an optimism that had similarly trailed the creation of the Commission. Interestingly, there is a dearth in the academic literature of works that examine the causative factors behind the institutions' inability to meet expectations, the standard and basis of these expectations, and possibilities for practical reform. This is not to say that attempts or suggestions have not been made towards resolving some of the institutional weaknesses of the system.<sup>37</sup> However, one may notice a gap in the form of a holistic analysis of the regional human rights system with the view to ascertaining the reasons behind its stunted development vis-à-vis the standards and expectations of the Charter, and a practical resolution of these difficulties. In 2016, an academic article was published<sup>38</sup> which sought to address some of these issues. This paper examined the effectiveness of the African human rights system within the context of global system changes using Oran Young's framework of effectiveness of global governance institutions. According to this framework, an institution is effective to the extent that its operations drive actors to act differently than they would if the institution did not exist or if some different institutional arrangements were put in place. The paper reached some similar conclusions as this research, for instance on the need for African states 'to let go of the excessive guard on sovereignty' in matters relating to the protection of

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<sup>35</sup> Wachira and Ayinla (n 33).

<sup>36</sup> Murray and Mottershaw (n 33).

<sup>37</sup> See for instance Wachira and Ayinla (n 33).

<sup>38</sup> Bossman E Asare, 'An Appraisal of Institutions of Global Governance: The Case of the African Human Rights System' (2016) 9(1) JPAS 221.

human and people's rights on the continent.<sup>39</sup> However, the adopted framework in that research, which was developed to determine whether institutions mattered in international relations, had an important limitation which is avoided in this research. This limitation is acknowledged and articulated by the author thus:

[T]he context to which the African human rights system was established is necessary in order to set a reasonable expectation for it, in the light of its peculiar strengths and challenges. Closely related to the first is the fact that such background knowledge will be important in the assessment of the theoretical objectives of the African system to know whether the objectives are appropriate and reasonably achievable. Unfortunately, the Young framework overlooks this. It is important to assess where an institution starts from and the background to that starting point... This is where Young's framework falls short. It does not factor in the context and the consequence of the context on the outcome of an assessment of institutional effectiveness.<sup>40</sup>

From the above, it can be seen that the Young framework, which was adopted in the research, did not permit adequate contextual analysis and the establishment of reasonable expectations based on such analysis. This is a loophole that is avoided in this research by the adoption of the immanent critique approach as will be explained in depth in the relevant sections below. Furthermore, it has to be pointed out that, being focused on the issue of institutional effectiveness, the Young framework neglects important questions on the practicability and suitability of the set standards and even the existence of other practical financial and socio-economic challenges. Thus such issues as weak state institutions with limited capacity, underdevelopment and slow pace of socio-economic growth, and poorly funded institutions are not paid the necessary attention.<sup>41</sup>

Another recent work that has critiqued the practice of human rights in Africa is Ike's text on the subject of human rights and democracy in Sub-Saharan Africa.<sup>42</sup> This work

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<sup>39</sup> *ibid* 234.

<sup>40</sup> *ibid* 233.

<sup>41</sup> *Ibid*.

<sup>42</sup> See Ike E Udogu, *Examining Human Rights Issues and the Democracy Project in Sub-Saharan Africa: A theoretical Critique and Prospects for Progress in the New Millennium* (LB 2014)

examines the practice of human rights in six Sub-Saharan African countries<sup>43</sup> based on the general provisions of the Universal Declaration, African Charter, and the International Covenant on Civil and Political Rights. The analytical template of the research was taken from the United States Department of State reports on human rights. The text generally furthers the notion that improving human rights practices and the democracy project in Africa would create an enabling environment for the continent's development objectives. This notion is similar to the much-traversed subject of identifying the role of law and human rights in the development of Africa—a concept that has been recently developed by Baderin.<sup>44</sup> While the text clearly offers enlightening analysis on the observance of 'human rights' in the selected countries, it is argued that the adopted framework limits the overall scope of the research. A near exclusive recourse to the United States Department of State reports on human rights meant that the research was virtually limited to the group of rights prioritised in those reports. This is clearly captured in the author's own words thus:

I discretionally selected some of the central issues raised in this report—as for example, torture and other cruel, inhuman and degrading treatment, arbitrary arrest or detention, respect of civil liberties, including freedom of speech and press, et cetera.<sup>45</sup>

While these issues are no doubt important and probably reflective of the continued poor state of implementation of those rights it has to be pointed out that they belong to one major subset of rights namely negative civil and political rights. This group of rights are usually the focus of international bodies and NGOs operating in countries some of which do not appreciate the status of positive socio-economic rights as 'real' rights.<sup>46</sup> What this means is that research based on such reports invariably relegate second generation socio-economic rights and third generation group and development rights. It is argued

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<sup>43</sup> South Africa, Kenya, Ethiopia, Mozambique, Liberia, Nigeria.

<sup>44</sup> See Mashood Baderin, 'Law and Development in Africa: Towards a New Approach' (2011) 1(1) NIALS JLD 1.

<sup>45</sup> Udogu (n 38) xiv.

<sup>46</sup> See for example the European Convention on Human Rights which initially made no provision for positive socio-economic rights and only added the Rights to Property and Education in an additional protocol. 47 member states of the Council of Europe are parties to this Convention.

that a proper evaluation of human rights in Africa should adequately consider these other groups of rights not only because they are provided in the African Charter, but also because they are necessary and significant in the African context. This research, in collating data on the practice of human rights on the continent, makes use of State Reports and Concluding Observations under the state reporting system of the African Charter. As will be clearly demonstrated in subsequent chapters,<sup>47</sup> these reports are generally modelled on the African Charter's content of rights which accords equal status to the different generations of rights.

### **1.3 Originality and Relevance of the Research**

The originality of this research is hinged on the adoption of immanent critique in the evaluation and assessment of the African regional human rights system. While a few works have examined the functioning and effectiveness of the African system, such examinations, however, have not drawn their basis (or have at least failed to establish it) from the perspective of measuring up to the internally established normative standards of the people. There is hardly any holistic examination of the theory and practice of human rights in Africa according to the Charter in the sense of a study that seeks to measure theory with practice, and then interpret arising discrepancies. Firstly, there has been a general failure to identify and justify a standard for measuring the practice of human rights. Where this has been done, such standards are (or at least allow) external transcendental models. This is not to say that such critiques are wrong or invalid, but rather that, as will be shown more clearly in the next section, the adoption of immanent standards allows for a different perspective and more meaningful results. The adoption of immanent critique in the evaluation of the African human rights system allows for better understanding and explanation of some of the key challenges to the practice and implementation of human rights in the continent which in turn gives room for more nuanced and practical reform suggestions. One important feature is the set order or sequence of such a critique. By ensuring a logical progression of the discourse

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<sup>47</sup> See, especially, Chapter 4.



from theory, practice, interpretations, and reforms, this approach ensures, not only a smooth transition throughout the thesis, but also a focused discussion, development, and resolution of the research questions.

Since the adoption of an African standard of rights as embodied in the African Charter,<sup>48</sup> there has been a strong need for a thorough assessment of the practice of human rights based on this standard. Such an assessment is necessary not only to evaluate the practice but also to appraise the contents of the Charter itself. Thus, in analysing discrepancies between theory and practice, the research would inevitably reveal difficulties and uncertainties created by the Charter itself. The analysis of the Charter as a whole (both in theory and practice) offers a more comprehensive and holistic assessment of the African regional human rights system and the operation of its institutional bodies.

As has been seen from the examination of the literature above, the issue of the effectiveness of the African regional human rights system is a recurrent theme. As such there is the need for further perspectives and approaches to the overall evaluation of the system and, even more specifically, to the issue of institutional effectiveness. It is argued that the system and process of immanent critique offers one such perspective for effectively evaluating the continent's regional human rights system. The adoption of this method means that certain important elements of the research are not left to assumption or general perceptions. For instance, the choice of the general standard, in this case the Charter, is addressed and justified. Also, the question of whether practice conforms to theory (or, in other words, whether human rights are properly implemented) must be determined by credible evidence and resources. In gathering such evidence, recourse must be had to the different reports of the major players in the system, namely the states, Commission, and Court. The next section explains this approach in more detail.

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<sup>48</sup> See Chapter 2.

## **1.4 Methodology and Theoretical Underpinnings: Immanent Critique**

This thesis adopts the immanent critique methodology in assessing and analysing the African regional human rights system. This approach allows for the assessment of systems based on their own internal standards or at least those norms that are publicly relied upon to justify and legitimate policy decisions. As such, it allows for a holistic discussion and assessment of the African regional system based on standards that are strictly internal to Africa—as opposed to external and transcendental standards that fall outside the African Charter. Also, immanent critique allows for a discussion of both the theoretical and practical aspects of the African human rights system. Thus it combines analysis of the African Charter, as a series of internal standards that African countries have signed up to, with the system in practice and draws a link between the two.

Even though immanent critique may, in principle, be a form of theoretical analysis, it is argued that its very nature allows for its adoption as a methodology. Accordingly, some writers have made reference to “the methodology of immanent critique”.<sup>49</sup> This approach is further discussed in the sections below.<sup>50</sup>

Immanent critique is important for this thesis at both substantive and methodological levels. This is because it allows for a logically progressive sequence of evaluations culminating in critical comparisons between the system as it ought to operate in theory, and how it is functioning in practice. As a result, it offers a vital link between the first part of the thesis (Chapters 2 and 3) and the second part (Chapters 4, 5 and 6), a link which would have been difficult to establish using other methodologies.<sup>51</sup> Its provision for theoretical and practical comparisons offers room for critical assessments well suited to the overall aims of this research.

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<sup>49</sup> See for instance, Craig Brown, *Critical Social Theory* (SP 2017) 104

<sup>50</sup> See 1.4.2

<sup>51</sup> This is further explained below.

By adopting the methodology of immanent critique, this thesis will analyse the normative and theoretical standards of the African system and then empirically examine their observance in practice to determine whether there are any discrepancies between what the system ought to be and what it is in practice. Following such analysis are questions on the results and how identified discrepancies are to be interpreted and resolved.

The following subsections will discuss the concept of immanent critique and how it will be applied in the context of this research. They will also examine some of the challenges and criticisms associated with this methodology and their effect, if any, on the research.

#### **1.4.1 The theory of Immanent Critique**

[W]e do not confront the world in a doctrinaire way with a new principle: Here is the truth, kneel down before it! We develop new principles for the world out of the world's own principles.<sup>52</sup>

An immanent critique is a form of evaluative research practice that derives the standards it employs from the object criticised, that is, the object or society in question, rather than approaching that object or society with independently justified generic standards.<sup>53</sup> Developed by the Frankfurt school, this method studies the internal standards of a society, assesses their implications, and then evaluates that society by its set standards rather than some 'objective' transcendental standard. In terms of the source of normative criteria it, therefore, works 'from the inside' in order to expose possible latent contradictions between what is being ideologically claimed, and what is empirically delivered, such that the perspective is judged by its own standards -- those which it claims to embody.<sup>54</sup>

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<sup>52</sup> Karl Marx and Friedrich Engels, *Collected Works : Volume 3 1843-1844* (LW 1987) 144-145

<sup>53</sup> Titus Stahl, 'What is Immanent Critique?' (2013).

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2357957](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2357957) accessed 15 August 2015

<sup>54</sup> Norman Lewis and Ian Harden, *The Noble Lie* (Hutchinson, London 1986).

An immanent critique of a society or system will therefore first study the norms and values of that society/system and then revisit the institutional, legal and other processes which are supposed to be based on these values to determine whether these processes and institutions adequately fulfil their intended roles. The legitimacy of these norms is mostly hinged on their source as emanating from the people. The argument has been made that by holding a given society to its own principles and demonstrating where exactly that society falls short, immanent critique frames more convincing arguments than criticism which holds that society to an external supposedly generic standard.<sup>55</sup> In other words, it turns the normative standards that a legal ideology employs back upon the institutional procedures and actions which are supposed to embody these standards.<sup>56</sup> Thus condemnations and criticisms rather than appearing alien and distant, like most external critiques, can show that a society can in whole or part fail also on its own terms.<sup>57</sup>

#### *Distinction from External Critique*

To better clarify and distinguish immanent critique (and to justify its selection) one needs to consider how it is distinguished from a purely external form of critique. The latter is a form of engagement that superimposes the normative standards of the legal scholar upon the 'target' of legal critique and then assesses this target only by the extent to which it conforms or departs from these alien criteria.<sup>58</sup> By implication, it presumes that critics have access to some kind of objective normative truth that enables them to criticise social practices without examining the reasoning and normative standards of the actual members of that society or their representatives. Because such critique avoids addressing its target on its own terms, the resulting criticisms lack any real engagement with the target and are likely to 'miss their mark' because the standards are likely to be contextually inappropriate.<sup>59</sup> On the other hand, immanent critique,

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<sup>55</sup> Mary Wrenn, 'Immanent Critique, Enabling Myths, and the Neoliberal Narrative' (2015) RRPE 1, 2

<sup>56</sup> Geoff Pearson and Michael Salter, 'Getting Public Law back into a Critical Condition: the Rule of Law as a Source for Immanent Critique' (1999) 8(4) SLS 483, 484.

<sup>57</sup> Titus Stahl (n 47).

<sup>58</sup> Geoff Pearson and Michael Salter (n 56).

<sup>59</sup> *ibid* 502.

rather than outline some abstract utopia, uses the society's dominant values and beliefs as a standpoint for promoting social criticism and change.<sup>60</sup>

#### **1.4.2 Methodology – Applying Immanent Critique to the Evaluation of the African Regional Human Rights System**

The application of the immanent critique approach to the evaluation of the African regional human rights system entails a systematic stage by stage analysis. Such analysis progresses from the normative framework of the African system to empirical studies of its application and finally to interpretations and implications of findings. To achieve this, the research will proceed according to the following stages:

- Analysis of the norms of the African Charter including its standards and their implications
- Analysis of how these norms should in principle be applied if they are to be consistent
- Determination of how the system is operating in practice with respect to those areas covered by the norms.
- Analysis of any discrepancy between how African states and the regional human rights institutions are operating or ought to in line with the second stage above.
- Interpretation of the implications of identified discrepancies including resolving questions such as whether the laws or standards are too ambitious to still be appropriate and whether, therefore, expectations need to be scaled down to be more 'realistic'.
- Conclusion of analyses and proposition of practical reforms. Thus if for instance, the conclusion is that the institutional framework and not the norms are responsible for the defects in the system, then issues such as how the institutions should be reformed to meet the set standards will be analysed.

These stages will now be discussed.

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<sup>60</sup> Kevin Gotham, 'Critical theory and Katrina: Disaster, spectacle and immanent critique' (2007) 11(1) City 81, 86.

### 1.4.3 Analysis of the African Charter

In evaluating the state of human rights in Africa and the performance of the regional enforcement mechanism the first port of call has to be the African Charter—the document that sets out these rights and standards and establishes the role of the institutions. Even though inarguably the continent’s most authoritative human rights document, the decision to analyse the African Charter’s content as representing Africa’s normative standards is not based solely on its reputation. Thus, Chapter 2 will trace the development of human rights in Africa and the role of the African Charter, the aim of this being to establish the status of the African Charter as a true reflection of African standards. Even though it contains what could be termed ‘western adaptations,’ the Charter professes the communal nature and spirit that characterised early African societies. This is shown clearly in its emphasis on peoples’ rights and duties. Also, the Charter acts as a perfect tool for analysis based on the nature of its origin<sup>61</sup> and general acceptance as representing the African standard of rights.<sup>62</sup>

After establishing the Charter’s position as setting out the norms and standards of the African system, this stage of the research will analyse these norms. This fulfils the immanent critique requirement that the claims and self-image of any legal perspective or practice of governance be evaluated by reference to the very standards to which they must appeal in order to secure its own legitimacy.<sup>63</sup> The conclusion of this phase naturally leads to the next stage of immanent critique which seeks to determine how these norms ought to be applied.

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<sup>61</sup> See Chapter 2.

<sup>62</sup> The Charter was drafted at the behest of African leaders following cases of governments’ abuse of power. It has been duly ratified by every African state (except South Sudan).

<sup>63</sup> Pearson and Salter (n 56) 485.

#### **1.4.4 Analysis of How the Norms Should be Applied**

An interpretation of the normative standards is followed by an analysis of how these standards are to be applied. In other words, how should the system operate in order to live up to and fully honour its own legitimating standards? Hence, this stage requires the critic to envisage how actual instances of empirical practices of governance would have to operate if fully conformed to the various practical implications of their own normative claims. Therefore, it has to be established whether the system has met the necessary minimum conditions needed to be satisfied 'in order to appeal to that standard or set of standards as a "master ideal"'.<sup>64</sup>

For the purposes of the thesis, the Charter is the first source for determining how the norms and rights stated therein are to be applied. Also the Commission, in a number of cases, has played the important role of defining many of the provided rights and establishing how they are to be applied. By ruling on violations of article provisions, the Commission sets standards of application.<sup>65</sup>

It is only after setting out what the system ought to be that the critic proceeds to investigate what the system is in actual practice. This next stage is important as the value judgments would remain abstract and lack practical realism were critical analysis to end at this stage.<sup>66</sup> This would be equivalent to 'merely making value judgments about the entirely theoretical adequacy of disembodied normative standards in themselves'.<sup>67</sup> There is, therefore, the need for a further phase involving recourse to the empirical realm of actual institutional conduct.

#### **1.4.5 Empirical Evidence of How the System is Operating in Practice**

After setting out the norms and standards and how they ought to be applied in principle, the research will proceed to the next stage of investigating how the system is operating

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<sup>64</sup> Lewis and Harden (n 54) 12.

<sup>65</sup> Some instances of this will be examined in Chapter 3.

<sup>66</sup> Lewis and Harden (n 54) 12.

<sup>67</sup> Ibid.

in practice. Harden and Lewis describe this stage as examining the relationship between claim and reality.<sup>68</sup> Here, specific empirical instances of institutional conduct are evaluated in the light of their own internal norms that are being relied upon to secure the institution's public legitimacy. These analyses typically involve empirical descriptions of law-in-action which more closely resemble socio-legal studies, than strictly doctrinal analysis.<sup>69</sup>

In the context of this research, this would mean that states and institutions tasked with the promotion and protection of human rights under the Charter—in this case, the African Court and Commission—come under scrutiny. Questions to be resolved could be framed in the following forms: How are these states and institutions operating and how effective are they in ensuring the set norms and standards? Also, what is the level of compliance of states with the human rights standards as espoused under the Charter and the decisions of the regional institutions? What are the steps being taken by the institutions to fulfil the provisions of the Charter to 'promote' and 'protect' rights? What actions do member states take to protect human rights in line with their duty under the Charter?

To resolve most of these issues recourse will be had to a number of sources including: the Activity Reports of the African Commission, Case Law (and statistics) of the African Commission and African Court, State Reports of member states, Concluding Observations on State Reports by the African Commission, reports of NGOs and special rapporteurs, research and data on state compliance with the decisions of the African Commission and Court, and a range of academic articles and commentaries.<sup>70</sup>

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<sup>68</sup> Ibid.

<sup>69</sup> Ibid 188.

<sup>70</sup> See section 1.8 for more information on the sources and methods of this research.



#### **1.4.6 Discrepancies and Inconsistencies between the ‘Ought’ and ‘Is’**

The next stage of the critique is to check for discrepancies between how the system is operating in practice and how it ought to operate in principle based on a proper implementation of the internal norms. This identification of possible contradictions is one of the core qualities of immanent critique. According to Hegel, immanent critique identifies what is self-contradictory, that which contradicts its true being, or ‘the disparity of the substance with itself.’<sup>71</sup> Thus this phase of the critique disrupts and challenges the operation of legal ideologies by identifying some degree of ‘shortfall’ between what is promised and what is actually being practised.<sup>72</sup>

This is one of the hallmarks of immanent critique as opposed to external transcendent critique. While the transcendent critique raises an external ideal image against the prevailing social and cultural conditions, dialectical immanent criticism instead makes conscious the inner contradictions, conflicts, tensions and ambivalences.<sup>73</sup> Accordingly, the research will examine the findings of the previous stage and compare them to requirements of the second stage. It will address questions such as whether the actions taken by the institutions and member states are in the spirit of the provisions. Also, is the current system a correct representation of the intentions of the Charter? Do the institutions and other actors deviate from the norms and if so in what ways?

#### **1.4.7 Interpretation and Implication of Results**

Immanent critique does not stop at identifying contradictions between principle and practice. It goes further to address these contradictions and requires scholars to focus specifically on their critiques’ practical implications for institutional reform; that is, what changes must, in practice, be both proposed and then implemented in order to resolve the discrepancy at the level of concrete lived experience between rhetoric and concrete empirical reality. The policy-oriented goal is to ‘show how the gap between the master

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<sup>71</sup> See Andrew Buchwalter, ‘Hegel, Marx, and the concept of Immanent Critique’ (1991) 29(2) JHP 253, 261.

<sup>72</sup> Pearson and Salter (n 56) 488.

<sup>73</sup> John Fornäs, ‘The Dialectics of Communicative and Immanent Critique’ (2013) 11(2) tripleC 504, 509.

ideals and current political and constitutional practice can be bridged.’ It has been pointed out that if an immanent critique is carried out with sufficient rigour, then it is capable of intensifying among its audience the very sense of contradictions between constitutional theory and practice which it first sets out to clarify, thereby further stoking the demand for remedial political reforms.<sup>74</sup>

This approach of determinate negation sets immanent critique apart from other forms of assessment which, by adopting transcendental standards, arrive at ‘indeterminate negations’. The latter characteristically provide ‘a totalised and completely dismissive type of critique’ whose practical implications are difficult to ascertain.<sup>75</sup> According to Harden and Lewis, immanent criticism should lead to a reform process involving the advocacy of policies which would seek to realise currently unfulfilled aspects of existing constitutional norms. Such critique should culminate in efforts to both update and then revise institutional practice and doctrine, that is, ‘to bring the expectations and the reality into closer harmony’.<sup>76</sup> Thus, it has been pointed out that immanent critique detects societal contradictions that offer possibilities for ‘progressive social change and the realisation of societal ideals’.<sup>77</sup> It can, therefore, be viewed as a strategy of social criticism and a theoretical vehicle for promoting progressive social change.<sup>78</sup>

After establishing the normative standards, the empirical practices, and the discrepancies between the two, the research will proceed to interpret these findings with the aim of proposing institutional and other reforms. The main task here is to establish the reasons for these discrepancies and how the inconsistencies can be resolved.

It should be pointed out that the adoption of immanent critique does not completely exclude external sources. Hence this research could, in a few instances, evaluate data

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<sup>74</sup> Lewis & Harden (n 54); Pearson and Salter (n 56).

<sup>75</sup> Pearson and Salter (n 56) 487.

<sup>76</sup> Lewis & Harden (n 54).

<sup>77</sup> Gotham (n 60) 85.

<sup>78</sup> Ibid.

from other regional systems for the purpose of comparing or explaining figures in the African system. Here the question may be raised whether such comparison does not amount to 'external' critique thereby contradicting the immanent critique framework. Such view, however, misunderstands the extent and purpose of immanent critique and consigns it to a purely 'internal' critique. Immanent critique is distinct from internal critique and can apply both internal and external criticism. What it spurns is not external criticism in itself but any transcendent standard which acts as the basis of such criticism.<sup>79</sup> Such external or seemingly 'transcendent' critique is rather integrated into a dialogical process with other positions.<sup>80</sup> In essence, to the extent that it does not act as a standard, such comparative analysis does not contradict immanent critique. In carrying out such comparison the distinctive features of both systems are taken into consideration and it is noted that a successful strategy in one system may be totally unworkable in the other.

## 1.5 Why adopt Immanent Critique?

Immanent critique methodology has been adopted for this project to provide a logically sequential and comprehensive analysis of the African regional human rights system. This analysis flows from concepts to practice, the interaction between the two, and then reform proposals. The choice of immanent critique overcomes the familiar dichotomy (often seen in the adoption of other forms of critique) between 'what is' and 'what ought to be'. It does this by combining the descriptive identification of normative values, with their practical support and active promotion.<sup>81</sup>

Furthermore, immanent critique is seen as the middle ground between mere theoretical descriptions and other forms of transcendent critique. This point is aptly captured in the words of Pearson and Salter:

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<sup>79</sup> Ali Rizvi, 'Confusion between internal and immanent critique' (2005) <<http://habermasians.blogspot.co.uk/2005/08/confusion-between-internal-and.html>> accessed 15 August 2015.

<sup>80</sup> Fornäs (n 73) 510.

<sup>81</sup> Pearson and Salter (n 56) 493.

On the one hand, there is the tendency towards a mainstream form of doctrinal scholarship whose descriptive aspirations lack any critical edge grounded in explicitly justified norms and normative claims. On the other hand, there is the temptation for critical legal scholars to [impose] a dismissive normative framework whose extrinsic character renders it incapable of even understanding the significance of the subject matter on its own terms. Faced with two equally unattractive and one-sided alternatives, neither of which is able to meet the standards of genuinely interdisciplinary scholarship, the rationale for immanent critique is to develop a 'third way'.<sup>82</sup>

The immanent critique approach also avoids some of the pitfalls associated with both purely external and internal critiques. While external critique tends to claim too much in terms of the force of objective moral truths, internal critique seems to run into the danger of claiming too little.<sup>83</sup> In the latter case, there could be practices where persons engage in evil or unjust behaviour without any internal inconsistency. And even if a critic can point out that some actions do not conform to their self-understanding of the agents, this does not answer the question as to whether they should resolve the mismatch by changing their actions or their normative beliefs. Thus, while external critique seems to have the problem of justificatory power, internal critique seems to have the problem of transformative potential. Immanent critique, on the other hand, proceeds from the actual social practices of a society but does not remain content with only reproducing the normative commitments of its members on the level of theory. It instead goes further to evaluate both the empirical behaviour constituting social practices and the explicit self-understanding of their members according to standards that are, in some sense, internal to those practices themselves. By doing so, immanent critique aims at a transformation of such practices that encompasses both actions and self-understandings.<sup>84</sup>

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<sup>82</sup> *ibid* 501.

<sup>83</sup> Stahl (n 53).

<sup>84</sup> *Ibid*.

The aforementioned should not suggest that immanent critique is without its own challenges and criticisms. Quite on the contrary, there are a number of charges levelled against this system of critique. Below are some of the criticisms and challenges and how this research will address them.

## **1.6 Challenges/Criticisms**

Like other forms of critique, the immanent critique approach is not free from criticism and there are conditions that must be satisfied to adequately employ this method. As this is by no means an attempt to deal comprehensively with the subject, this section shall only set out and briefly discuss some of the main points.

Some of the most common criticisms of immanent critique are that it is a form of conventionalism and, therefore, committed to relativism; that it is inherently conservative; and that it is subjective, and its results characteristically underdetermined.<sup>85</sup>

On the first charge of conventionalism, it is not hard to see reasons for this criticism. By its nature, immanent critique is conventional in the sense that it places value and emphasis on 'culturally dominant understandings and norms'. While this would indeed be a good thing in the case of violation of 'valuable norms' like political equality, immanent critique could also be seen (in the opposite case) as 'the best antidote' to conventionalism because its adoption ensures that no conventional norms or practices are beyond question and challenge. In the words of Larsen, 'the existent' must be grasped in its own terms in a way that encompasses the possibility of its own critique, that is that the critique must be able to show that the nature of its social context is such that this context generates the possibility of a critical stance towards itself.<sup>86</sup> Similarly, Fornäs points out that immanent critique must strive for some kind of transgression

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<sup>85</sup> Dan Sabia, 'Defending Immanent Critique' (2010) 38(5) PT 684.

<sup>86</sup> Neil Larsen, 'Literature, Immanent Critique, and the Problem of Standpoint' (2009) 24(2) Mediations 48.

since otherwise the established order would just be reproduced and perpetuated. However, this transgression fetches neither its motivation nor its force from external ideals that are dogmatically applied and contrasted with the current state of affairs, but rather from a reworking of the tensions and contradictions that propel and challenge this ruling order from within itself.<sup>87</sup> Also, the point is made that for ‘deeply divided conditions’ like capitalist modernity (and, in this case, an African concept of human rights) the most effective critique of such issues ‘fetches its strength from its inner, rather than its outside’. This is because social reality is hardly ever a ‘monolithic and self-reproducing machinery of power’ which could ideally only be resisted from its outside.<sup>88</sup> Thus, whereby the effect of conventionalism is to endorse conventional beliefs, immanent critique could be used to challenge them. Because immanent critique aims typically at criticism and change, it asks whether the interpretations (of practice, norm, and ground) are convincing, the empirical claims credible, and the arguments and appeals coherent and consistent.<sup>89</sup>

Nonetheless, one must not ignore the ever present danger and tendency of sticking to conventional principles. This necessity is aptly captured by Hall in his reference to chattel slavery in ancient Greece:

Certain defenders of immanent critique hold that there always exist practically efficacious internal resources for social critique. However, I think that the analysis of chattel slavery in ancient Greece offered by Williams in *Shame and Necessity* should make us treat this claim with some suspicion. Williams notes that ‘slavery was taken as necessary ... to sustaining the kind of political, social and cultural life that free Greeks enjoyed’ and that ‘the effect of the necessity was ... that life proceeded on the basis of slavery and left no space, effectively, for the question of its justice to be raised’. When we reflect on our politics such recognitions can generate the despairing thought that no matter how hard we try, it is incredibly likely that we are wronging people in ways that we cannot even envisage; ‘the main feature of the Greek attitude to slavery ... was not a morally primitive belief in its justice, but the fact that considerations of justice and injustice were immobilised by the demands of what was seen as social and economic necessity’, and ‘that

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<sup>87</sup> Fornäs (n 67).

<sup>88</sup> Ibid.

<sup>89</sup> Sabia (n 79) 691.

phenomenon has not so much been eliminated from modern life as shifted to different places'.<sup>90</sup>

He advocates acceptance of the limits of these forms of critique instead of merely wishing them away:

[T]his is the sort of truthful recognition that we ought to confront if we are to avoid deceiving ourselves... we ought to... work within these limits as best we can, by attuning our moral sentiments and seeking to comprehend the myriad ways in which people are mistreated, and then try to do something politically to sort them out.<sup>91</sup>

The charge of relativism is another challenge that confronts immanent critique as its starting point is necessarily subjective.<sup>92</sup> However, it has been argued that immanent critique is compatible with and open to the possibility of transcultural and cosmopolitan norms.<sup>93</sup> Such norms, however, require cultural translation and grounding in order to gain local authority. Accordingly, the first chapter of the thesis examines this issue of cultural relativity in an attempt to determine the exact delineation of the concept of human rights in Africa. It should be noted that the African Charter, which is the source of the normative standards of this critique, is also, in part, a product of transcultural infusions and development—and the standards encapsulated therein are not by any means lacking international standard and commendation.

Sabia admits to the charge of underdetermination (and subjectivity) describing it as inevitable, and a reflection of the human condition and not of the approach. It should, in his opinion, lead theorists to recognise and respect human diversity and admit to the role of power, and thus to tragedy or loss, in political and social life.<sup>94</sup> He describes the problem of underdetermination thus:

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<sup>90</sup> Edward Hall, 'Realism and Liberalism in the Political Thought of Bernard Williams' (2013) (PhD Thesis, London School of Economics and Political Science 2013).

<sup>91</sup> Ibid.

<sup>92</sup> Jean Vincent, 'Adorno and Marx' (2006) HMBS 489, 492.

<sup>93</sup> Sabia (n 85) 685.

<sup>94</sup> Ibid.

[T]he alleged identity of a people or culture has to be constructed out of unstable, contested, and contestable materials, and thus any proffered interpretation will be extremely difficult to defend as definitive and authoritative... Because immanent critique requires the reading of complex, multivalent, and vaguely bounded texts, individual critics are likely to produce a variety of plausible yet conflicting interpretations and therefore a variety of plausible but conflicting assessments.<sup>95</sup>

These observations on the interpretation of cultures and standards are true and apply even to this research hence the steps taken in Chapter 2 to justify the 'Africanness' of the African Charter. Despite its general acceptance and authority, there have been some commentators who have questioned the autochthony of the African Charter and its position as the manual of human rights in Africa.<sup>96</sup> This thesis does not avoid these challenges but rather confronts them in order to unravel the underlying rationales for the varying positions. Going further, Sabia states:

Since there is no distinct, objectively existing text or set of brute facts or pre-given meanings, the actual text immanent critics 'see' will to some significant degree be not only constructed, but constructed in ways affected by their particular position and perspective, and since the text is complicated and mutable, the interpretations they offer and those they find plausible will be likewise affected by their position and perspective.<sup>97</sup>

The second challenge identified by Sabia concerning the absence of 'an objectively existing text' is largely avoided in the context of this research as the Charter is treated as such a text. However, there is still the challenge of interpreting the Charter based on subjective positions and perspectives. In this case, however, there are a number of sources including interpretations of the Commission and opinions of various jurists that naturally aid in interpreting otherwise unclear provisions of the Charter. In any case, being a PhD research, this thesis does not shy away from arguing and substantiating

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<sup>95</sup> *ibid* 688.

<sup>96</sup> See for instance Shivji (n 5).

<sup>97</sup> Sabia (n 85) 689.



subjective interpretations, the aim being to make original and significant contributions to extant literature.

Going further, Stahl identifies three conditions which every work of immanent critique must fulfil:<sup>98</sup>

- It must clarify the claims that standards or normative potentials do exist within social practices that are irreducible both to the actual regularities of actions within these practices and to the conscious self-understanding of its participants.
- It also needs to answer the question as to how a critique can find out what these standards are.
- It must show why the existence of such a standard should constitute a reason for persons engaged in a social practice to change their behaviour. Thus, how is such critique capable of justifying its demands?

Chapters 2 and 3 of the thesis will address the first couple of challenges identified by Stahl. There is already a good amount of research that establish the communal and group philosophy of African culture as well as the normative principles espoused in the African Charter.<sup>99</sup> It is important to note that the concept of human rights in Africa is relatively nascent and prehistoric isolated practices and observances of human dignity do not necessarily translate to rights.<sup>100</sup> It is this recency that eases the task of discovering the exact nature of human rights in Africa—a task that was undertaken by the committee of eminent jurists during the years of the drafting of the Charter. On the issue of the second condition, therefore, the answer simply lies in the African Charter. It is argued that by its very nature and origin, the process of drafting, and its wide unrivalled acceptance by African member states, the African Charter provides an appropriate source on which to base an immanent critique of African human rights.<sup>101</sup>

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<sup>98</sup> Titus Stahl (n 43).

<sup>99</sup> See for instance Thaddeus Metz, 'Ubuntu as a Moral Theory and Human Rights in South Africa' (2011) 11 AHRLJ 532, Shivji (n 5), Heyns (n 17), Isanga (n 17).

<sup>100</sup> See Chapter 2.

<sup>101</sup> Ibid.

The third condition is an important one for every immanent critique. As Sabia crafts it: it is not clear why one should suppose that if some principle or norm, practice or institution, seems to cohere with some culture, or seems to be in accord with most or all of a people's morality or ideals, that it is, therefore, a rational or worthy or justified norm.<sup>102</sup> It has even been argued that such grounding of norms in particular cultures is undesirable 'since cultures entertain only parochial visions of the real range of possibilities and capacities for societies or lives', and even the victims of 'injustice' may internalise self-images and self-understandings that justify their experiences.<sup>103</sup> But as has already been pointed out, the essence of immanent critique does not lie in a blind endorsement of culture otherwise the second and final phases of the approach would be pointless. Rather, immanent critique interrogates and challenges conventional understandings of the authoritative texts that ultimately ground practices and norms by developing perceived superior interpretation of their identity or authenticity, meaning, coherence, and import.

In any event, it is believed that this third condition is easily met in the context of this research. The African Charter (much like the Universal Declaration which Universalists would hold as a standard) was drafted in response to systemic human rights violations and gross incompetence on the part of state actors. Thus, it should not be difficult to justify the demand for persons and institutions to change their behaviour according to its standards as a total disregard of these norms would be tantamount to large-scale civil and economic breakdown. In response to the query as to why the African Charter, as opposed to other external ordinances, should be this standard it is argued that the African Charter being fine-tuned to African cultural values is more easily assimilated and connected with the African people. It is also important to take into consideration the colonial history of Africa and the onward struggle against perceived acts and forms of

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<sup>102</sup> Sabia (n 85) 689.

<sup>103</sup> Onora O'Neill, *Towards Justice and Virtue* (CUP, New York 1996) 21.

imperialism and western control. The African Charter, it is argued, is indigenous and autochthonous and therefore commands more legitimacy.<sup>104</sup>

## **1.7 Conclusion on Methodology**

In this chapter, I have explained the theory of immanent critique and how I intend to apply it to my research on the regional human rights system in Africa. I have explained the various steps necessary for attaining this goal. These steps are the evaluation of norms, examination of the empirical practice, interpretation of results and practical reform suggestions. It is argued that immanent critique is best suited to this research as opposed to purely external critique which is often based on transcendent standards for which little basis is provided. The preceding section has examined some of the main challenges of this approach and how this research addresses them. On the issue of conventionalism, the aim of the research is more to detect challenges to implementation in the text of the Charter than a blind endorsement of its provisions. Even more important, as will be demonstrated in the next chapter, is that the African Charter is not necessarily a 'conventional' document in the sense of being a blind adoption of every prehistoric African practice or principle. Rather it adopts a moderate system of cross-cultural adaptations especially with regard to its provisions on civil and political rights. As such, the criticism of conventionalism cannot reasonably be valid in the context of this research. Also, on the challenges of subjectivity and underdetermination, it has been pointed out that recourse to the African Charter as embodying the region's standard of rights significantly narrows those challenges. In conclusion, while the methodology of immanent critique does come with its own challenges, it is believed that there are enough resources to address them in the context of this research and to finally produce a thesis of substance, quality, and originality.

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<sup>104</sup> See Chapter 2.

## **1.8 Sources and Methods**

This research employs a wide range of traditional sources of international law such as relevant treaties, state practice, and opinions of jurists. For the purposes of this study, the African Charter constitutes the theoretical standard and forms the basis for analysis on compliance with human rights norms and standards. In interpreting some of the provisions of the Charter, the decisions on communications of the African Commission as well as the opinions of legal writers and jurists are duly considered.

In evaluating and measuring the practice of the Charter by states, the study employs the following sources:

- NGO statements,
- Special Rapporteur Reports and Press Statements, and
- State Reports of member states and corresponding Concluding Observations of the Commission.

The choice of these sources is explained below.

### **1.8.1 NGO Statements**

In fulfilling its role as the watchdog of the Charter, the Commission enlists the assistance of regional and international NGOs to whom the Commission grants observer statuses. The grant of this status enables direct participation of the NGOs in the Commission's activities. NGOs are informed of the days and agenda of forthcoming sessions of the Commissions and allowed to send their representatives to participate in these sessions. Such participations give room for the NGOs to issue reports on the human rights situations in their countries.

With the Commission having granted observer status to 477 human rights NGOs since its inception,<sup>105</sup> it is expected that the reports of these NGOs would play an important role in assessing the situation of human rights in a number of African countries. Since

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<sup>105</sup> African Commission, <http://www.achpr.org/network/ngo/by-name/>, accessed 27 July 2016.

NGOs are, by their very nature, disconnected from the state or national governments, their reports are usually explicit and do not have the occasional tendency to gloss over state inefficiencies like, say, State Reports. Also, some of these NGOs are specialised in that they focus on specific areas of human rights such as women's or children's rights thereby affording proper evaluation of the situation in those areas.

### **1.8.2 Rapporteur Statements and Press Releases**

The Commission's Rules of Procedure allow for the creation of Special Rapporteurs as subsidiary mechanisms of the Commission. These Special Rapporteurs head specialised areas of human rights such as prison conditions, women's rights, and treatment of human rights defenders (HRDs). They are mandated to monitor the situation of their respective areas and present a report of their work to the Commission at each ordinary session. Given their status as subsidiary mechanisms of the Commission the reports of these special rapporteurs, especially after being presented to the Commission, represent the views of the Commission. By their very nature, Special Rapporteurs are the eyes and ears of the Commission in their various assigned areas of speciality. As a result, it is expected that their assessments in these specialised areas of human rights will offer a significant basis for measuring state compliance with human rights responsibilities.

### **1.8.3 On the use of State Reports and Concluding Observations**

State Reports are self-assessments drafted by the member states themselves detailing what steps they have taken to give effect to the rights and freedoms guaranteed by the Charter. The submission of State Reports is a requirement provided by the Charter to which every state party must adhere. By this provision, state parties are to submit every two years a report on the 'legislative or other measures' taken to give effect to the rights in the Charter.

The analysis of State Reports has been identified as ‘the most important means of monitoring compliance’ with instruments at the international level.<sup>106</sup> By studying State Reports, this research will gain insight into the workings of the various governments and how they assess their regimes based on the Charter provisions. This creates a balance as these reports provide an avenue to view and assess positive human rights developments in these countries as opposed to other reports which generally tend to ignore these positive developments and focus almost exclusively on violations. These State Reports reveal a host of legislative, executive, and judicial human rights measures that have been initiated by state parties ignorance of which would impair any credible assessment of compliance with the Charter provisions.

State Reports are also important because, unlike the other identified sources, they address the different facets of the Charter: civil/political rights, socio-economic rights, group rights, and women’s rights. As such, analysis of the practice of human rights is not limited to just civil or socio-economic rights—a risk that is bound to be run were the discourse to be limited to the other sources above. The holistic nature of State Reports—and, by extension, Concluding Observations—significantly curbs this tendency.

Most State Reports begin by responding to issues raised in the most recent Concluding Observation of the Commission and then proceeding to state the specific measures that have been taken to address these issues. Some states have also adopted the approach of explaining the observance of each right in the sequence that they appear in the Charter. This ensures that some rights are not left out in the assessment. In turn, the Concluding Observations acknowledge positive developments in the states and provide a range of issues to be worked on and addressed in subsequent State Reports.

With regard to the practice of the institutions, the study will rely on the Activity Reports of the Commission and Court taking into consideration the evaluations of academic

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<sup>106</sup> See Dejo Olowu, *An Integrative rights-based approach to human development in Africa* (PULP 2009) 35.

experts. Activity Reports, which are mandatorily submitted to the Assembly,<sup>107</sup> contain relevant information on the activities of both institutions within the period reported. Where necessary, the research will also rely on the official websites of the Court and Commission for important information and data. Some of such information include the institutions' past and upcoming promotional missions, their respective lists of pending and finalised cases, and the official records of communications and cases.

#### **1.8.4 Challenges and Possible Limitations**

There are some challenges that may be encountered in the course of the research ranging from the scope of the study to the choice of sources. One of the obvious challenges is in measuring compliance with the Charter. Africa is a huge continent with 54 countries and, as such, any analysis can only recreate a general picture or highlight very weak or strong areas of compliance. Challenges that could be faced include the risk of overgeneralisation or concentration on a few countries or even one or two regions of Africa—say West Africa or East Africa. On the other hand, an in-depth analysis of the situation of each country is not only impractical and cumbersome but also raises its own problems of final summation and aggregation. To counter some of these challenges, the research will analyse different classes of reports with the aim of covering several human rights issues, a reasonable proportion of countries with due regard to geographical and continental spread, and an aggregation of data and statistics.

To ensure a geographical spread, the study of states' compliance will analyse the most recent State Reports and Concluding Observations of countries from the different sub-regions of Africa: East, West, North, Central, and Southern Africa. The factors taken into consideration for selection include states with the most up to date submissions, geographical size, and population (as representing a large part of that sub-region), and volatility and high level of criticism for human rights infringements. To this end, the

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<sup>107</sup> African Charter, art 54.

thesis will examine the reports and concluding observations of the following states: Uganda, Nigeria, Sudan, Cameroon, and Malawi.<sup>108</sup> These examinations will be subdivided into civil/political rights, socio-economic rights, and group rights where sufficiently addressed in the reports. Special attention will also be paid to women's rights as covered under an additional Protocol to the Charter.<sup>109</sup> It is important to point out that this selection of states applies only to analyses of State Reports and Concluding Observations of the Commission and do not extend to NGO statements and Special Rapporteur reports.

While appearing straightforward, the use of State Reports and Concluding Observations comes with its own challenges for the research. The major challenge is that many states are either late by one or two reports or have not submitted any at all. For instance, by 2015, only eight states had submitted all of their reports. 15 states were late by one or two reports, 24 states were late by three or more reports, and seven states had not submitted any reports at all.<sup>110</sup> As of March 2016, only nine states had submitted all their reports. 15 states were late by one or two reports, 23 states were late by three or more reports while seven states had not submitted any reports.<sup>111</sup> This, of course, is already a default in responsibility as the Charter mandates state parties to submit these reports.<sup>112</sup> In any case, as it would not be practicable to provide an analysis of every State Report and Concluding Observation in this research, only states with up-to-date reports have been considered for the purpose of this research.

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<sup>108</sup> These states were chosen based on the already listed criteria with the availability of up-to-date reports being the most crucial requirement. East Africa is represented by Uganda, West Africa by Nigeria, North Africa by Sudan, Central Africa by Cameroon, and Southern Africa by Malawi.

<sup>109</sup> The African Charter (and its accompanying protocols) form the fulcrum of this study. Consequently, other regional human rights instruments like the African Charter on the Rights and Welfare of the Child, while important in their own right, are not included. This exclusion is due to the position that the Charter (including its protocols) is the primary human rights instrument in the continent and the other regional human rights instruments necessarily derive from it.

<sup>110</sup> See The African Commission, <http://www.achpr.org/states/>.

<sup>111</sup> African Commission on Human and Peoples' Rights, <http://www.achpr.org/states/reports-and-concluding-observations/> accessed 11 March 2016.

<sup>112</sup> African Charter, art 54.



Another possible criticism of State Reports is the tendency of member states to hype achievements while glossing over otherwise important deficiencies. The research ameliorates this tendency by matching State Reports with accompanying Concluding Observations of the Commission. Concluding Observations are the Commission's responses to the information contained in each member's State Report as well as important issues that the Commission requires the state to resolve. In drafting these observations, the Commission makes use of its own findings and investigations as well as the observations of relevant NGOs.

## **1.9 Concluding Remarks**

This first chapter has introduced the topic of the research—human rights in Africa, and the adopted methodology—immanent critique—for analysing this topic. It was argued that there was a gap in the current literature pertaining to a holistic analysis of the regional human rights system with the view to ascertaining the reasons behind its stunted development vis-à-vis the standards and expectations of the Charter, and a practical resolution of these difficulties. It was clarified that the research would, in order to make an original contribution to the literature, apply the immanent critique approach, in analysing the theory and practice of human rights in Africa with the aim of identifying discrepancies between the two facets. It would then proceed to interpret these discrepancies with the aim of making practical reform proposals to improve the correlation between the theory and practice.

The chapter further set out the stages of the research and how it intended to both apply and overcome some of the peculiar challenges of immanent critique. The sources to be relied on as well as the challenges and limitations of these sources were stated and explained. Having set out and explained these steps, the research will now proceed to its first stage which is an introduction to the notion of regional human rights and, more specifically, the African Charter and its concept of rights.

## **CHAPTER 2**

### **2 History and Development of Conceptions and Models of Regional Human Rights in Africa: The African Charter as the Foundation of Human Rights in Africa**

#### **2.1 Introduction**

This chapter is an introduction to the notion of regionalism in general and, more specifically, the African concept of human rights. Following the description of the stages of immanent critique in the preceding chapter, this chapter provides justification for the choice of the African Charter as the basis for analysing and assessing the concept and practice of human rights in the continent. The chapter begins by introducing the concepts of universalism and regionalism and tracing the well traversed universalism-cultural relativism debate. It then proceeds to examine the origin and foundation of the African Charter with the view to justifying its position as the human rights manual of the continent.

#### **2.2 The Case for Regional Conceptions of Rights**

In the aftermath of the Second World War, especially the Holocaust which was fuelled by anti-Semitism, there were movements to enshrine universal rights to forestall similar events in the future, and a reluctance to allow state and even regional interpretations of rights. Early architects of the post-war institutions favoured a 'universal' over a particularist or regional approach to problems which, in the 1930s, had acquired a bad

name.<sup>1</sup> The belief informed by utopian post-war thinking was that only a universal or near-universal collective of states could offer the best guarantee of international order.<sup>2</sup> The 1948 Universal Declaration of Human Rights (Universal Declaration) was a natural outcome of this inclination towards a universal solution.<sup>3</sup>

Arguments for regionalism have however persisted, the debate on the universality of human rights being almost as old as the movement toward universal human rights standards.<sup>4</sup> These arguments have ranged from making a case for regional bodies as the effective machinery for enforcing universal rights to proposing that regions have autonomy in devising their own standards of rights. With regard to the former, it has been argued that neither sovereign states which are autonomous, supranational organisations which depend on voluntary patterns of compliance, nor private organisations which lack resources and enforcement mechanisms, can adequately protect human rights.<sup>5</sup> Thus, the case is made for a protective mechanism which would function at an intermediate level, exercising authority which is broader than the sovereign state yet closer to the affected communities than a global supranational organisation—in other words a regional human rights organisation.<sup>6</sup>

Initially, the United Nations' (UN) approach was to shun regionalism in favour of the universal approach to human rights. However, given the rise and growth of regional bodies, and in recognition of their role in conducting political and security affairs, the UN eased its stance towards regionalism. After considerable discussions and pressure from parties with an interest in empowering regions, the principle of regionalism was accommodated by the UN Charter though within an institutional and legal hierarchy that

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<sup>1</sup> Louise Fawcett, 'The History and Concept of Regionalism' (2012) 4 ESILCPS 6.

<sup>2</sup> *ibid.*

<sup>3</sup> See Universal Declaration of Human Rights, art 28.

<sup>4</sup> Tracy Higgins, 'Anti-essentialism, Relativism, and Human Rights' (1996) 19 HWLJ 89, 92.

<sup>5</sup> Carol Tucker, 'Regional Human Rights Models in Europe and Africa: A Comparison' (1983) 10 SJILC 135, 139.

<sup>6</sup> *ibid* 139.

clearly favoured universalism.<sup>7</sup> This envisaged that the UN could, for instance acting through the Security Council, use regional arrangements or agencies for enforcement action under its authority. This development, while assigning important roles to regions, did not address, at least satisfactorily, the second issue of regional interpretation and construction of rights. Non-Western countries were often reluctant to wholly apply some provisions of human rights covenants viewing the individualistic and capitalistic nature of some of these rights as purely Western ideologies. In the African case, and with the constant emergence of African scholars and critics, there was a strong debate on the actual 'universality' of these rights. Given that Africa had little impact in the drafting of the Universal Declaration<sup>8</sup> there was the question of whether its provisions, as well as those of subsequent international covenants adequately represented Africa's communitarian disposition and culture. The perceived imposition of Western ideals as universal and the relegation of African norms also prompted allegations of Western imperialism.<sup>9</sup> This led to calls for the formulation of an African concept of human rights based on African history and culture. However, despite the creation of an African Charter, pertinent issues relating to the interpretation of rights, such as the recent clampdown on homosexual activities in African countries, continue to rear their heads. Such issues highlight the tension between regional and 'universal' interpretations of rights and pose the question of just how much regional perceptions and cultures have to play in the interpretation and application of rights.

### **2.3 Universalism, Liberalism, and Cultural-Relativism**

One major point of contention in human rights scholarship is the universality of rights—that is, whether there are universal rules and principles of human rights that supersede

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<sup>7</sup> Chapter VIII of the UN Charter provides for regional arrangements. Article 53 provides that the Security Council can utilize regional arrangements or agencies for enforcement action under its authority. See Louise Fawcett (n 1).

<sup>8</sup> At the time of the drafting and adoption of the Universal Declaration, there were only 4 African member states of the UN: Egypt, Ethiopia, Liberia, and apartheid South Africa. See Abdullahi An-Na'im (ed), *Human rights under African constitutions: realizing the promise for ourselves* (UPP, 2013) 9.

<sup>9</sup> See, for instance, Makau Mutua, 'The Ideology of Human Rights' (1996) 36 VJIL 589.

other variants and thus constitute universal standards. This universalism-cultural relativism debate proceeds on the assumption that the legitimacy of international human rights law depends on the existence of fundamental principles of justice that transcend culture, society, and politics.<sup>10</sup> Universalists argue that the contents of human rights are universal and apply to every person irrespective of culture. Thus these rights accrue to a person by virtue of his or her existence as a human being. The Universal Declaration can be considered a template of these universal rights. On the converse side are the cultural relativists who mostly argue that the purported universal rights are only products of Western culture bordering mainly on a liberal ideology. They argue that the cultural peculiarities of diverse regions must be respected. This impasse has seen the rise in debates and condemnations of various laws ranging from the banning of facial coverings (hijabs) in France<sup>11</sup> and the criminalisation of gay unions in several African and Asian countries.<sup>12</sup>

The Universal Declaration proclaims itself as 'a common standard of achievement for all peoples and nations'.<sup>13</sup> This presupposes that all nations are to be assessed based on how they observe the enshrined provisions. Commentators have questioned this philosophy which appears to present human rights theory as non-ideological, impartial, and the quintessence of human goodness.<sup>14</sup> This idea of an almost divine nature of human rights ignores the influences of Western history and liberalism. Mutua argues

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<sup>10</sup> Guyora Binder, 'Cultural Relativism and Cultural Imperialism in Human Rights Law' (1999) 5 BHRLR 211.

<sup>11</sup> The French government banned the wearing of religious veils in public sparking fierce outrage and protests by Muslims worldwide. In November 2013, the European Court of Human Rights began examining the ban. On this same day, the French Court of Appeal upheld the right of a nursery to fire a female employee. Fatima Afif, who insisted on wearing an Islamic headscarf at work. See Aljazeera America, 'France defends full-face veil ban at European human Rights Court', <http://america.aljazeera.com/articles/2013/11/27/france-defends-fullfaceveilbanateuropeanrightscourt.html>, accessed 23 March 2014.

<sup>12</sup> See Rodney Muhumuza, ABC News, 'Uganda slapped with aid cuts over anti-gay law' <http://abcnews.go.com/International/wireStory/uganda-slapped-aid-cuts-anti-gay-bill-22693295>, accessed 7/03/2014, Christian Purefoy and Faith Karimi, CNN, 'Nigerian Senate Passes Anti-gay Bill, defying British Aid Threat', [http://www.cnn.com/2011/11/30/world/africa/africa-gay-rights/index.html?\\_s=PM:AFRICA](http://www.cnn.com/2011/11/30/world/africa/africa-gay-rights/index.html?_s=PM:AFRICA), accessed 7 March 2014.

<sup>13</sup> Preamble, United Declaration of Human Rights.

<sup>14</sup> Mutua (n 9) 591.

that human rights and Western liberal democracy are virtually tautological and that the former is, in fact, the universalised version of the latter. Thus human rights represent the attempted diffusion and further development, at the international level, of the liberal political tradition. The continued reluctance to identify liberal democracy with human rights, he argues, delays the reformation, reconstruction, and the 'multiculturisation' of human rights.<sup>15</sup>

However, not all Universalists, if any, deny the liberal foundation of the human rights corpus. For some, this does not detract from its validity and global applicability. Binder states that the early attempt to ground human rights as a superior source of authority was in response to the statist or legal positivist model of international law which rooted international law's validity in the will of powerful governments thereby rendering international law of human rights superfluous.<sup>16</sup> It was in the attempt to overcome the 'foundationalist' arguments of defenders of the absolute autonomy of sovereign states that advocates sought a foundation for international human rights law in the natural liberty of individuals.<sup>17</sup> However, Binder does not accept that human rights need a foundation to be legitimate, as the absence of this does not refute its value judgements. He posits that post-colonial states are Western as much as indigenous institutions and are, as such, colonial extensions of a Western-dominated global state system.<sup>18</sup> These developing societies are not 'nations' possessed of 'national' cultures, the idea of national culture being a Western idea closely associated with the institution of the modern state, and the presence of a disconnect between the state sector and other cultural structures. He argues that rather than ask whether human rights standards are authentic to the national cultures of the developing world, the better approach should be to ask how human rights contribute to building decent and democratic societies in a developing world suspended between local and global cultural structures. Thus, the

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<sup>15</sup> *ibid* 592.

<sup>16</sup> Guyora Binder (n 10) 216.

<sup>17</sup> *Ibid*.

<sup>18</sup> *ibid* 226.

problem, in his view, is not that human rights standards are too imperialistic but that they are not imperialistic enough.<sup>19</sup>

Binder's argument is very interesting even though it appears to argue only for why human rights, based on Western culture, should be applicable in post-colonial states thus side-stepping states like Russia and many Islamic nations who were not subjects of Western colonialism but remain prone to heavy criticisms of human rights violations. It is not difficult to agree that many post-colonial, especially African, states have been heavily influenced by Western culture such that existing cultural structures have lost most of their traditional flavour. This is partly demonstrated by the African Charter which enumerates several civil and political rights that were arguably non-existent in several African Communities.<sup>20</sup> Also, many African constitutions, rather than adopt the often touted African traditional communitarian system, are often modelled after Western constitutions. Howard has argued that industrialisation has dismantled what she terms the peasant worldview or communitarian ideal, and replaced it with values of secularism, personal privacy, and individualism. She believes that the African worldview which, in her view, is peasant and traditional, must give way to the Western worldview which is urban and modern and anchored around the individual.<sup>21</sup> She cites Kenya and Nigeria, as examples of societies where the traditional concept of solidarity is giving way to individualism.

Furthermore, making no pretences about the imperialistic undertones of Universalist school of thought, Howard and Donnelly argue that 'a particular type of liberal regime' which must be institutionalised 'within a relatively narrow range of variation'<sup>22</sup> is

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<sup>19</sup> *ibid* 221.

<sup>20</sup> Even though many African authors have tried to draw comparisons between observances in traditional African societies and human rights provisions, they still admit that African societies did not emphasise individual rights in the same way that European societies did. See Makau Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1994) 35 *VJIL* 339, 348.

<sup>21</sup> Rhoda Howard, 'Evaluating human rights in Africa: Some problems of implicit comparisons' (1984) *HRQ* 160 cited in, Mutua, 'The Banjul Charter' (n 20) 355.

<sup>22</sup> Rhoda Howard and Jack Donnelly, 'Human dignity, human rights, and political regimes' (1986) 80(3) *AMSR* 801.

essential for the practice of human rights globally. Communitarian societies, they argue, are antithetical to the implementation and maintenance of human rights, because they deny the autonomy of the individual, the irreducible moral equality of all individuals, and the possibility of conflict between the community's interests and the legitimate interests of any individual.

The above arguments on the closed nature of human rights appear to affirm the relativists' arguments of imperialism and supplantation. Mutua argues that the forceful rejection of dialogue leads to the inevitable conclusion that there is a hierarchy of cultures, an assumption that he claims is not only detrimental to the human rights project but is also inconsistent with the human rights corpus' commitment to equality, diversity, and difference.<sup>23</sup> The human rights movement, he argues, must not be closed to the idea of change or believe that it is the final answer—'It is not'.<sup>24</sup>

In defence of the charge that the universalists' position is inconsistent with the human rights doctrine on equality, diversity, and difference, Langlois argues against the tendency to translate liberalism's claim to be egalitarian towards individuals to mean that liberalism must be egalitarian towards all conceptions of the good life that are held by these individuals.<sup>25</sup> It is mistaken, he argues, to equate the equality of human beings with the equality of their ideas. Thus, liberalism conceptually separates the individual both from his or her views and from the views of the communities or traditions to which they belong. Every flexibility, he argues, stops at the point where the individual is threatened. However, Langlois fails to clarify the exact point where the individual can be said to be threatened and which interpretation should be adopted in evaluating a threat. Would the individual be threatened by a law mandating head scarves and not one prohibiting indecency? Would he or she be threatened by stoning as a form of capital punishment instead of a 'non-threatening' electric chair? Would he be threatened by anti-gay laws and placated by prohibitions of polygamy and necrophilia?

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<sup>23</sup> Mutua, 'The Ideology of Human Rights' (n 9) 656.

<sup>24</sup> *ibid* 653.

<sup>25</sup> Anthony Langlois, 'Human Rights and Cosmopolitan Liberalism' (2007) 10(1) *CRISSP* 29.



Would a law banning marijuana threaten the individual or would the prohibition of euthanasia be an encroachment? These questions go to show that there are still grave issues of cultural and historically influenced leanings regarding what is adopted and what is left out.

It may even be argued that some of these ‘universal’ rights become touted as such only after they have been accepted by some select countries. For instance, only in 2004, did Massachusetts become the first state in the US to legalise gay marriage; not until 2013 was the Marriage (Same Sex Couples) Act 2013 passed in the UK—a huge development considering that the Buggery Act of 1533 punished homosexuality by death. However, in what may appear to be a stark disregard for their still nascent and fledgeling gay rights corpus, the West has hit African countries like Uganda with sanctions and aid cuts following anti-gay legislations in these countries.<sup>26</sup> These actions seem to pass across the message of: Now that we allow it, so must you.

It is certainly not the aim here to justify recent African anti-gay law or disparage the Western position but to point out the tendency to impose as universal standards, decisions based on decades of western history on other regions. It is often in reaction (or fear) to these superimpositions that these regions fight back to ‘protect’ their culture. The point is that regions, especially those with painful colonial history, will usually fight off as impositions, western norms that are not historically situated.

Another practice steeped in western history but now touted as having universal application is the principle of liberal democracy which envisages the existence of democratically elected governments and the recognition of individual freedoms. Such is

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<sup>26</sup> Holland, Norway, and Denmark suspended aid worth millions of dollars to Uganda. Foreign aid constitutes up to 20% of the Ugandan budget. The US and Britain have also threatened aid cuts. See Rodney Muhumuza, ABC News, ‘Uganda slapped with aid cuts over anti-gay law’ <http://abcnews.go.com/International/wireStory/uganda-slapped-aid-cuts-anti-gay-bill-22693295>, accessed 7/03/2014, Christian Purefoy and Faith Karimi, CNN, ‘Nigerian Senate Passes Anti-gay Bill, defying British Aid Threat’, [http://www.cnn.com/2011/11/30/world/africa/africa-gay-rights/index.html?\\_s=PM:AFRICA](http://www.cnn.com/2011/11/30/world/africa/africa-gay-rights/index.html?_s=PM:AFRICA), accessed 7 March 2014

the propagation of this practice that labelling a country as undemocratic is enough to paint it in the worst possible light, and has been the basis for western-backed bloody revolutions and overthrow of governments in Africa and even during the recent Arab Spring. Again, the aim is not to criticise this concept which admittedly has its merits. Rather, it is to demonstrate how western traditions and developments have easily and frequently been translated into universal rights.<sup>27</sup> This no doubt is largely owing to the 'internationalisation of Western European and North American models of the nation-state, constitutional orders, and international relations through colonialism' as these standards were routinely included in constitutional bills of rights upon independence.<sup>28</sup> The danger of this system is that these rights, being alien to the people, or even merely perceived as such, not only run the risk of being undervalued but could also be despised and rallied against. Thus, there have been calls for a multicultural approach to reform the human rights regime so as to make it more universal.<sup>29</sup> Schwartz sees the necessity of a cross-fertilisation of culture if a universal human rights corpus is to emerge.<sup>30</sup> This way, every culture would have its distinctive ways of formulating and supporting human rights. A similar view is held by Baderin who advocates 'the need for sincere and justificatory cross-cultural evaluations of human dignity' in evolving an international moral value.<sup>31</sup>

This 'cross-fertilisation', as will be subsequently demonstrated, is evident in the construction of the African Charter given the peculiar colonial history of the region. In the meantime, it must be stated that the above analyses lend further credence to the adoption of the immanent critique methodology for this research. In such a sensitive area as human rights, there is the need to search for culturally situated standards and

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<sup>27</sup> Art 21(3) of the Universal Declaration provides for 'universal' and equal suffrage and secret vote.

<sup>28</sup> Abdullahi An-Na'im (ed), *Human rights under African constitutions: realizing the promise for ourselves* (UPP, 2013) 9.

<sup>29</sup> Mutua, 'The Ideology of Human Rights' (n 9) 591.

<sup>30</sup> Richard Schwartz, Human Rights in an Evolving World Culture, in Abdullahi An-Na'im and Francis Deng (eds) *Human Rights in Africa: Cross-cultural perspectives* (BIP 1990) 382, cited in Mutua (n 9) 656.

<sup>31</sup> Mashood Baderin, 'Modern Muslim States between Islamic Law and International Human Rights Law' (PhD thesis, University of Nottingham 2001) 20.

norms and their interpretations by the people within those societies. Findings from these could open up further grounds for reforms both as to the standards and to the institutions or states enforcing and practising them. By their very nature, culture and normative values of societies play a huge role in the development of human rights and in their acceptance and implementation, and this is even more important in the African case given its peculiar colonial history.

## **2.4 The Role of Culture in Human Rights Development**

African scholars have stressed the need for human rights to be built and developed from local culture. This, it is argued, gives legitimacy and acceptability to the 'modern' universal human rights regime.<sup>32</sup> Ibhawoh argues that a complementarity, if not absolute congruence, of state laws and cultural norms is required if national human rights regimes are to gain grassroots acceptance.<sup>33</sup> Similarly, Cobbah opines that, instead of imposing the western philosophy of human rights on all cultures, efforts should be directed at developing homomorphic equivalents in different cultures.<sup>34</sup> On his part, Pityana argues that international norms should not be regarded as an invariable template but as minimum standards or a framework which permits further dynamic developments and expressions. What is required, he opines, is the legitimising of all cultures as sources of rights.<sup>35</sup> In a similar vein, Mutua posits that societies at their grassroots have to participate in the construction of principles and structures that enhance the human dignity of all.<sup>36</sup> These norms and structures, he opines, must be home-grown, and must utilise the cultural tools familiar to the people at the grassroots. Also, in his proposed reconceptualisation of human rights in Africa, Shivji states that human rights discourse should be historically situated and socially specific. He argues

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<sup>32</sup> Bonny Ibhawoh, 'Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State' (2000) 22(3) HRQ 838, 843.

<sup>33</sup> *ibid* 844.

<sup>34</sup> Josiah Cobbah, 'African Values and the Human Rights Debate: An African perspective' (1987) HRQ 309, 310.

<sup>35</sup> Barney Pityana, 'The Challenge of Culture for Human Rights in Africa: The African Charter in a Comparative Context' in Malcolm Evans and Rachel Murray (eds) *The African Charter on Human and People's Rights: The System in Practice, 1986–2000* (CUP 2002) 228.

<sup>36</sup> Mutua (n 9) 606.

that any debate conducted on the level of moral absolutes or universal humanity is not only fruitless but ideologically subversive of the interests of the African masses.<sup>37</sup> These arguments reiterate the view that human rights have to be autochthonous—they have to emanate from the people. This stance or approach is not restricted to Africa but has been canvassed by other regions and countries. For instance, none of the member states of the Council of the Arab League ratified the Arab Charter initially, only adopting a revised Arab Charter in 2004, certain parts of which clearly departed from the universal standards, for example, with regard to the international human rights for women, children and non-citizens, and in equating Zionism with racism.<sup>38</sup> Furthermore, the discussions in meetings of Asian states in the period prior to the World Conference revealed opposition to acceptance of the human rights rules and principles in ‘western-based’ UN declarations, conventions and other instruments, as always universally applicable and superior to national and regional norms and principles.<sup>39</sup> This view was captured in the ASEAN<sup>40</sup> preambular statement which described human rights as existing ‘in a dynamic and evolving context’ and made references to historical experiences and cultural realities. Other regional charters have expressed similar sentiments.<sup>41</sup>

Another example of the fight against perceived western imposition was at the 1994 United Nations Population Conference in Cairo where the Vatican joined with several Muslim governments to condemn what they viewed as the imposition of Western norms of sexual license and individual autonomy on the rest of the world.<sup>42</sup> Although most advocates of reproductive control at the Population Conference did not attempt to

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<sup>37</sup> Issa Shivji, *The Concept of Human Rights in Africa* (ABC 1989) 69

<sup>38</sup> Chaloka Beyani, ‘Reconstituting the Universal: Human Rights as a Regional Idea’ in Conor Gearty and Costas Douzinas (eds) *The Cambridge Companion to Human Rights Law* (CUP 2012) 177

<sup>39</sup> Gabriel Wilner, ‘Reflections on Regional Human Rights Law’ (1995) 25 GJCL 40 423

<sup>40</sup> Association of Southeast Asian Nations

<sup>41</sup> The Tunis Declaration states that it is not possible to prescribe a model at the universal level because one cannot ignore historical and cultural realities of each particular nation as well as the traditions, norms and values of each people. Also, Paragraph 9 of the Bangkok Declaration provides that human rights must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities, and various historical, cultural and religious backgrounds.

<sup>42</sup> Tracy Higgins (n 4) 89

translate policy claims into the language of international human rights, the issue of cultural relativism was central to the debate over differing visions of the family and the role of women.<sup>43</sup> The Pakistani Prime Minister, while acknowledging substantial problems of overpopulation in Pakistan and other Muslim countries, criticised what she perceived as Western efforts to impose norms of radical individualism on the rest of the world. Several Muslim countries including Sudan and Saudi Arabia boycotted the talks altogether.

These divergent conceptions show how cultures can affect interpretations of human rights in different regions. On the other hand, however, regional instruments and bodies are perceived to have more legitimacy than alien institutions and are more able to harness the political will to commit to the protection of human rights.<sup>44</sup> They derive legitimacy through the articulation and implementation of distinctive regional norms and practices.<sup>45</sup> Thus the Arab League, for example, derives legitimacy through its 'Arabness', drawing on a rich common culture and history while the states of Southeast Asia are known for their articulation of the 'ASEAN way'—a consensus-based approach based upon strict observance of sovereignty.<sup>46</sup>

Perhaps as a pointer to the importance of culture in human rights interpretation, Pityana observes that, although worded in Universalist terms, international human rights norms are beginning to espouse a moderate version of relativism. He refers to the Vienna Declaration and Programme of Action of 1993 which he opines sought to address the 'universalism versus relativism' debate by resorting to the principle of margin of appreciation developed within the jurisprudence of the European Convention on Human Rights (European Convention) in order to take account of cultural specificities when applying human rights norms.<sup>47</sup> This principle of margin of appreciation entails that there would be no interference, in certain cases, with the laws and decisions of a

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<sup>43</sup> Ibid.

<sup>44</sup> Beyani (n 38) 186.

<sup>45</sup> Fawcett (n 1) 4.

<sup>46</sup> Ibid.

<sup>47</sup> Pityana (n 35) 224.

member state where those laws or decisions have a proper legal basis and the domestic authorities have made genuine and reasonable efforts to balance the right in question with other rights or interests.<sup>48</sup> Thus, the European Court stated in a case<sup>49</sup> that the machinery of the Convention was subsidiary to the national systems protecting human rights and that certain rights, such as the freedom of expression, allowed each state a margin of appreciation to interpret and apply them.<sup>50</sup> That this principle, following Pityana's argument, is now being reflected in international human rights instruments only goes to show the necessary inherent relativity in the concept of human rights.

While the debate on the universality of human rights may rage on, it is safe to argue that the school of relativity has gained some ground as shown in some of the examples above. Also, the existence of regional human rights instruments, more than anything else, highlight the need for region-specific approaches and interpretations based on cultural norms and values. It is on this premise that the subsequent sections of this chapter will examine the African situation and the development of the African regional human rights framework.

## 2.5 Development of Human Rights in Africa

There have been debates about whether human rights existed in pre-colonial Africa. Some writers have pointed to practices in early African societies to show that the inhabitants of these societies had awareness and respect for human rights.<sup>51</sup> For instance, Mutua argues that much of the discussion about whether pre-colonial societies knew of and enforced individual human rights have taken place in the absence of 'considered justice, and reference to, judicial processes in those societies'.<sup>52</sup> His

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<sup>48</sup> Steve Forster, *Human Rights and Civil Liberties* (3<sup>rd</sup> edition, PEL) 66.

<sup>49</sup> *Handyside v United Kingdom* (1976)1 EHRR.

<sup>50</sup> Forster (n 48).

<sup>51</sup> Mutua enumerates a number of practices among the Akan and Akamba people of Kenya that demonstrate that the concept of rights informed the notion of justice and supported a measure of individualism. See Mutua, 'The Banjul Charter' (n 20) 348.

<sup>52</sup> Higgins (n 4), Mutua, 'The Banjul Charter' (n 20) 352.

studies, which examine the Akan and Akamba societies of Kenya, show that protection of individual rights was of preeminent importance to pre-colonial societies.<sup>53</sup> Similarly, M'Baye states that pre-colonial Africa had a system of rights and freedoms, although there was neither the recognition nor the clear formulation of such rights and freedoms as they are recognised in contemporary times.<sup>54</sup> More recently, Metz has made a strong attempt to link the South African principle of *ubuntu* with human rights.<sup>55</sup> By this principle, a person's claim to human rights is predicated on how he or she communes with others or honours communal relationships.<sup>56</sup> This *ubuntu*-based moral theory, Metz claims, serves as a promising foundation for human rights.<sup>57</sup> On the converse side, Howard argues that there is no specifically African concept of human rights. The argument for such concept, she asserts, is based on a philosophical confusion of human dignity with human rights.<sup>58</sup>

It appears that whether or not human rights can be said to have existed in pre-colonial African societies would depend on the definition of human rights adopted by each writer. For Howard, human rights are individual claims or entitlements against the state, and in this sense, there is only one conception of human rights and that is Western.<sup>59</sup> Asante, on the other hand, believes that human rights are concerned with asserting and protecting human dignity and that they are ultimately based on a regard for the intrinsic worth of the individual. Therefore, they are not peculiarly or even essentially bourgeois or Western.<sup>60</sup> This opinion is shared by Metz who makes the presumption that human rights are grounded in human dignity.<sup>61</sup> Nevertheless, and despite early similarities among societies, it is argued that contemporary (or 'universal') human rights are

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<sup>53</sup> Ibid.

<sup>54</sup> Keba M'Baye and Ndiaye Birame, 'The Organization of African Unity (OAU)' in Karel Vasak (ed), *The International Dimensions of Human Rights* (GP 1982).

<sup>55</sup> Thaddeus Metz, 'African values and Human Rights as Two Sides of the Same Coin: A Reply to Oyowe' (2014) 14 AHRLJ 306-321; Thaddeus Metz, 'Ubuntu as a Moral Theory and Human Rights in South Africa' (2011) 11 AHRLJ 532-559.

<sup>56</sup> Thaddeus Metz, 'Ubuntu as a Moral Theory' (n 55) (2011) 540.

<sup>57</sup> Ibid 536.

<sup>58</sup> Rhoda Howard-Hassmann, *Human Rights in Commonwealth Africa* (Rowman & Littlefield 1986) 23.

<sup>59</sup> Ibid.

<sup>60</sup> S Asante, 'Nation Building and Human Rights in Emergent African Nations' (1969) 2 CILJ 72.

<sup>61</sup> Metz (n 55) 541.

inarguably steeped in modern Western history. It may be true that there were semblances of human rights observance in early African societies but even these are measured against a certain modern Western standard. To illustrate this position, a parallel may be drawn with similar arguments in the field of anthropology on 'modernity' where the argument was made that it was necessary to rethink understandings of modernity to take account of the many different sorts of 'modern' cultural trajectories that anthropologists were documenting.<sup>62</sup> The object was to develop a more pluralised understanding of modernity—a variety of different ways of being modern or 'alternative modernities'. This expectedly led to questions on the meaning of the term 'modernity' and if, as was argued in one text,<sup>63</sup> Cameroonians practising witchcraft are in fact being 'modern'. Ferguson pointed out that inasmuch as the idea of multiple or alternative tracks through modernity may hold true in East and Southeast Asia where countries like Malaysia, Singapore, and Taiwan develop economically like the West without necessarily becoming 'westernized', such may not be the case in Africa where economic convergence with First World living standards 'hardly seems to be in the offing'.<sup>64</sup> Thus, in Africa, the aspiration to modernity has been an aspiration to rise in the world in economic and political terms. Africans see their lack of modernity in the bad roads, poor health care, dilapidated structures, and precariously improvised livelihoods.<sup>65</sup> Where anthropologists proclaim Africa 'always already modern' (including in its practice of witchcraft), local discourses on modernity see a continuing lack, not in terms of a cultural inferiority, but of political-economic inequality.<sup>66</sup>

In a similar vein, ascribing human rights values to native African practices does not reflect the large-scale inequalities present in those societies. In a largely patriarchal

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<sup>62</sup> Arjun Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* (UMP 1996) cited in James Ferguson, *Global Shadows: Africa in the Neoliberal World Order* (DUP 2006).

<sup>63</sup> See Peter Geschiere and Janet Roitman, *The Modernity of Witchcraft: Politics and the Occult in Postcolonial Africa* (University of Virginia Press 1997) .

<sup>64</sup> James Ferguson, *Global shadows: Africa in the Neoliberal World Order* (DUP 2006) 32.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.



system riddled with such mundane practices as the cutting and sewing up of female genitalia,<sup>67</sup> killing of twins,<sup>68</sup> and stoning of 'witches' on mere allegations, one can hardly expect an argument for the observance of what are now commonly known as human rights. A couple of similarities of local practices with modern human rights standards do not make up for countless cases of discrepancies. What is important is that there were no clearly established standards in those societies that guaranteed general human rights, as we know them today, to a person on the sole basis of his or her humanity.

It is not difficult to understand the attempts to establish a human rights culture, no matter how little the basis, in native Africa. By this, African writers seek to paint a different picture from the savagery and brutality that characterise perceptions of primordial Africa—a perception that portrays Africa as being saved from gloom by the West. However, it is contended that this perception need not arise. Even though the modern concept of human rights has its foundation in recent Western history, this does not presuppose that these Western societies had always practised or observed them. Western history is replete with ignominious cases of human rights abuses ranging from slavery and witch-burning to the Holocaust. It was such occurrences that precipitated constant agitations for human rights provisions, culminating in the Universal Declaration. It is the standard of observance as espoused in the Universal Declaration that this thesis adopts as the definition of 'human right' when used in general parlance—a standard which many pre-colonial African societies, and even their Western counterparts, did not quite measure up to. Thus, instead of approach the subject as a debate on cultural superiority, African scholars should confront it as one of cultural development.

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<sup>67</sup> The practice of Female Genital Cutting was prevalent in several African societies and is still widely practiced.

<sup>68</sup> Before the advent of Christianity in the early 19<sup>th</sup> century, the birth of twins in some Southern Communities in Nigeria, was considered an abomination. Twins were either killed at birth or abandoned to die in the evil forest. See for instance, Derek Asiedu-Akrofi, 'Judicial Recognition and Adoption of Customary Law in Nigeria' (1989) 37 AJCL 571.

### 2.5.1 The African Charter in the Development of African Human Rights

After independence, in the immediate aftermath of colonialism, African countries were more concerned about protecting their territorial sovereignty than the development of a regional human rights system. The Organisation of African Unity (OAU) Charter<sup>69</sup> recognised human rights only within the context of promoting African unity and made no mention of human rights apart from the right of peoples to self-determination.<sup>70</sup> The focal points of interest were political unity, non-interference in the internal affairs of other states, and the liberation of African territories still under colonial domination.<sup>71</sup> As Okere notes, the focus on state sovereignty invariably diminished human rights efforts as there was 'apparent antinomy' between promoting the protection of human rights and emphasising the exclusive domain of control of each state.<sup>72</sup>

The implication of these provisions was that the OAU became a guardian of incumbent regimes even when these regimes were oppressive to their own people. Also, the implicit privileging of existing states within their pre-determined borders also made it impossible to deal constructively with secessionist struggles such as those of Biafra, Eritrea or Somaliland.<sup>73</sup> Millions of lives were lost in those struggles.

Okere describes the individuals of these African states as dissolved in the mass of collectivity while despotic regimes, protected by the shield of territorial integrity and non-interference, unleashed barbarous repressions against their subjects.<sup>74</sup> These shortcomings of the OAU agitated African jurists and statesmen who initiated a series of conferences and consultations with a view to creating an African Commission on

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<sup>69</sup> This is the charter establishing the OAU and should be distinguished from the African Charter on Human and Peoples' Rights referred to as the African Charter in this work.

<sup>70</sup> Obinna Okere, 'The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems' (1984) 2 HRQ 141, 142.

<sup>71</sup> The First paragraph of the Charter's Preamble reads: 'It is the inalienable right of all people to control their own destiny.'

<sup>72</sup> Okere (n 70) 143.

<sup>73</sup> Bjørn Møller, 'The African Union as a Security Actor: African Solutions to African Problems?' (CSRC 2009) <http://eprints.lse.ac.uk/28485/> accessed 9 June 2014.

<sup>74</sup> Okere (n 70) 144.

Human Rights.<sup>75</sup> In 1979, the Assembly of Heads of States and Governments requested the Secretary-General of the OAU to organise a restricted meeting of highly qualified experts to prepare a preliminary draft of an African Charter on Human and Peoples' Rights providing for the establishment of organs to promote and protect human and peoples' rights.<sup>76</sup> A draft charter was prepared and considered by a meeting of government experts before being adopted and signed in June 1981 during an OAU Summit in Nairobi, Kenya.

*The African Charter: A True Reflection of African Standards?*

As has already been highlighted, the African human rights system was created at a time of massive human rights violations and domestic crises in a number of African states. By the adoption of the African Charter on Human and Peoples' Rights ('African Charter' or 'the Charter'), African leaders hoped to establish a common regional standard of rights and accord a semblance of legality to existing governments. By providing for regionally recognised rights and creating institutions for enforcement, the OAU was guaranteeing protection to Africans irrespective of the nature of government in power in their various countries. This was an improvement on one of the OAU's initial core principles of non-interference in the affairs of member states even in the face of massive human rights violations. By the creation of the Charter African states accepted, at least in theory, the primacy of human rights over national sovereignty and the necessity of general regional standards. The question that however arises, in line with previous analyses on the role of culture, is whether the African Charter is a true reflection of African standards. This question, of course, comes with its own challenges given the size and complexity of the continent.

The African Charter has been described as a product of the ideological cleavages of the Cold War, and as reflecting a compromise between the ideological and belief systems

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<sup>75</sup> *ibid.*

<sup>76</sup> *ibid.*

represented at its negotiations.<sup>77</sup> These diverse interests have been described as including 'atheists, animists, Christians, Hindus, Jews and Muslims; and ... over fifty countries and islands with Marxist-Leninist, capitalist, socialist, military, one-party and democratic regimes.'<sup>78</sup> The presence of a mixed ideology in the Charter can be attributed to the need to appease and win the signatures of member states with varying political and ideological leanings. The infusion of these different ideologies and the need to create a middle ground could partly account for the inclusion and prominence of economic, social and cultural rights in the African Charter—a set of rights often consigned to 'second-rate status'<sup>79</sup> and visibly sidelined in the Universal Declaration—as well as the concept of duties. For instance, Gittleman has pointed out that it was the need to ensure the eventual adoption of the Charter by every state that drove the drafters to provide that if the individual is to have rights recognised by the state, he also must have obligations flowing back to the state.<sup>80</sup> Human rights as espoused by the African Charter was, therefore, a cross-pollination of different ideas and conceptions of rights. First, there was the intent of the framers to create a charter inspired by African legal philosophy and responsive to African needs.<sup>81</sup> This intent, clearly stated in the Charter's Preamble,<sup>82</sup> was demonstrated by the inclusion of the concepts of duties, socio-economic rights, peoples' rights and even 'family rights'. There was also the Western influence given the existence of the Universal Declaration to which African states were signatories. This was demonstrated by the inclusion of civil and political rights which bore close semblance to the rights contained in the Universal Declaration and the International Covenant on Civil and Political Rights.

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<sup>77</sup> Chidi Odinkalu, 'Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights, in Malcolm Evans and Rachel Murray (eds) *The African Charter on Human and People's Rights: The System in Practice, 1986–2000* (CUP 2002) 181.

<sup>78</sup> Victor Dankwa, 'The Promotional Role of the African Commission on Human and People's Rights' (2002) in Malcolm Evans and Rachel Murray (eds) *The African Charter on Human and People's Rights: The System in Practice, 1986–2000* (CUP 2002) 352.

<sup>79</sup> Odinkalu (n 77) 182.

<sup>80</sup> Richard Gittleman, 'The African Charter on Human and Peoples' Rights: A Legal Analysis (1982) 22 *VJIL* 667, 676-677.

<sup>81</sup> *ibid* 667.

<sup>82</sup> The Preamble notes the intent of the drafters to take into consideration the virtues of the historical tradition and the values of African civilization which should inspire and characterize the reflection on the concept of human and peoples' rights.

In recognising the need to take into consideration the virtues of African historical tradition and the values of African civilisation in formulating the rights,<sup>83</sup> the Charter underlined the importance of culture in setting out a human rights template while not deviating from general principles of human rights contained in declarations adopted by the OAU and the UN.<sup>84</sup> This approach appears to conform to the moderate form of relativism canvassed by Pityana whereby international norms are regarded as minimum standards or a framework which permits further dynamic development and expressions.<sup>85</sup> For instance, Baderin points out that, while endeavouring to match international human rights norms, the African system appeared 'to be sensitive to African cultural norms, as portrayed by its approach to polygamous relationships under the African Women's Protocol'.<sup>86</sup> Furthermore, Okere posits that, in formulating guaranteed rights and correlative duties, the African Charter is obviously animated by the Universalist vocation and naturalist principles which underlie human rights. He, however, notes that despite its Universalist leanings, the African Charter has specific characteristics whose inspiration derive solely from Africa's colonial history, philosophy of law, and conception of man. He defines this African conception of man as not that of an isolated and abstract individual but an integral member of a group animated by a spirit of solidarity.<sup>87</sup> It may, therefore, be deduced from the above that the African Charter adopted both a Universalist and regional perspective—the individual and group, rights and duties.

Another unique quality of the African Charter is its approach to socio-economic rights. Despite precedents such as the Committee on Economic, Social and Cultural Rights (CESCR) that subject these rights to available resources of a state, the African Charter

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<sup>83</sup> African Charter Preamble.

<sup>84</sup> Ibid.

<sup>85</sup> Pityana (n 35) 227.

<sup>86</sup> Mashood Baderin, 'Recent Developments in the African Regional Human Rights System' (2005) 5(1) HRLR 117, 148. Here, Baderin is referring to Article 6 of the Women's Protocol which, rather than prohibit polygamy as is done at the international level, provides that the rights of women should be protected in these relationships.

<sup>87</sup> Ibid 148.

makes no such concessions. Mbazira opines that this difference reflects a desire by its drafters to produce an 'exclusively' and 'distinctively' African instrument.<sup>88</sup>

The African Charter has often been lauded for its 'originality' vis-à-vis the provision for corresponding duties. Beyani, however, points out that the notion of duties originates from the American and Universal Declaration and is not the novelty of the African Charter that many assume.<sup>89</sup> He argues that through its notions of duties, peoples' rights (derived partly from the principle of self-determination in the UN charter), and issues of progressive culture, the African Charter shows that far from being a threat to universality the document's provisions become concrete expressions of what universality means in specific places. Of course, if the provisions for duties and peoples' rights (and by extension other provisions of the African Charter) are shown not to be particular to the African Charter, then the Charter's 'Africanness' can be called into question.<sup>90</sup> This view may be initially compelling given that the authors of the African Charter recognised that, while sticking to African specificities in dealing with rights, it was nevertheless prudent not to deviate much from the international norms solemnly adopted in various universal instruments by the different member states of the OAU.<sup>91</sup> It thus appears that the drafters of the Charter viewed the Universal Declaration and other international human rights instruments as setting minimum universal standards of human rights which were not to be deviated (or deviated much) from. Thus the Charter's approach to regionalism is that of moderate relativism whereby regions follow universal standards even though with slight regional adjustments. Accordingly, regional treaties like the African Charter have been referred to as 'supplements to UN treaties' which have mainly been developed to correct the perceived exclusion of the continent from the UN drafting system.<sup>92</sup>

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<sup>88</sup> Christopher Mbazira, 'Enforcing the Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights: Twenty Years of Redundancy, Progression and Significant Strides' (2006) 6 AHRLJ 333, 342.

<sup>89</sup> Chaloka Beyani (n 38) 149.

<sup>90</sup> *ibid.*

<sup>91</sup> OAU Doc CAB/LEG/67/3 rev 1 at 2 cited in Okere (n 70) 152.

<sup>92</sup> Frans Viljoen, *International Human Rights Law in Africa* (OUP 2012) 282.

Some experts, like Shivji, have criticised this approach arguing instead for a system suited to Africa's history rather than 'an uncritical acceptance of Western liberal conceptions.'<sup>93</sup> It may, however, not be the best approach to criticise the African Charter for adopting what are arguably Western liberal standards. Despite the imperialist undertones that naturally accompany such steps, it is argued that Africa can choose any set of practices believed to be necessary for the transformation and general wellbeing of the African populace regardless of whether these beliefs are Western, imperialistic or non-universal. It should be recalled that this adoption was necessary at the time given the oppressive nature of many post-colonial African regimes like the Idi Amin government of Uganda and the evolving system of governance in many African states. Thus the argument against the universality of 'universal human rights' does not detract from its adoption by a particular region as valid and applicable in that region. In other words, it is not mandatory for every region to formulate unique principles and norms, and the fact that certain practices originate from a different clime does not mean that they cannot apply to other regions. This is because transnational exchanges of cultural products and ideas are not incompatible with enduring forms of cultural difference.<sup>94</sup> Rather, cultural differences are produced, thrive, and take on their significance within social relations of interconnection, not in primordial isolation.<sup>95</sup> For instance, as Ferguson points out, people in Calcutta drinking Coca-Cola would no more spell the end of Indian culture than the colonial adoption of the Indian drink tea by Londoners abolished Englishness. Instead, he argues that 'a host of local studies' show that transnational traffic in meaning led not to a global monoculture, but to complex forms of cultural creativity whose result was not a numbing uniformity but a dynamic 'cut-and-mix' world of surprising borrowings, ironic reinventions, and dazzling resignifications.<sup>96</sup>

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<sup>93</sup> Shivji (n 37) 20.

<sup>94</sup> Ferguson (n 64) 30.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

Furthermore, it has been correctly argued that the communitarian ideal, which is often touted as the African system on which an African concept of human rights should be built, while adequate for a traditional community would be difficult to attain in a contemporary nation-state in Africa.<sup>97</sup> While traditional African communities functioned within a given set of social and legal relationships particular to each community, the contemporary African state functions through different social and legal systems. Consequently, the checks and balances that were available to traditional communities do not apply to contemporary African States.<sup>98</sup> Therefore, arguments for a system of human rights based on the old 'African' communitarian system, in utter disregard of existing and evolving structures, are necessarily flawed.

It is possible to link this line of thought to Binder's argument above that developing countries are extensions of their colonial states and necessarily adopt the latter's cultural heritage. Imperialism, Binder states, is an intractable reality in the global state system and no scheme of human rights norms will be effective unless it is institutionalised within that imperial system.<sup>99</sup> Thus the adoption of Western principles and ideologies would be a direct consequence and reflection of Western domination. The important task would be to avoid a wholesome uncritiqued acceptance of these borrowed norms but, like Ferguson argues, to cut-and-mix them to suit the African situation—a task that the African Charter clearly attempts.

However, the Charter's origin is not that simple and straightforward. Far from being an adoption of seasoned principles, Shivji believes the African Charter to be almost farcical and built on deceit. Africa's human rights rhetoric at the time of the drafting of the African Charter, he argues, was reminiscent of the American rhetoric led by President Carter which sought to salvage the US morally and establish the state's legitimacy following the Vietnam debacle and the Watergate scandal. Thus, even while supporting

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<sup>97</sup> Sakah Mamud, 'The State and Human Rights in Africa in the 1990s: Perspectives and Prospects' (1993) 15 HRQ 485, 489.

<sup>98</sup> Ibid.

<sup>99</sup> Binder (n 10) 221.



and arming dictators in Africa, such as Idi Amin of Uganda and Nguema of Equatorial Guinea, the United States had to produce a few peripheral actions, such as linking of aid to human rights record to show its seriousness.<sup>100</sup> Similarly, after the fall of the dictatorships,<sup>101</sup> African Presidents had to salvage their severely tainted human rights image before the Western world as well as re-establish their aid-worthiness. This they did by appointing a committee of experts to prepare a draft of an African Charter on Human and People's Rights—a charter which 'bears the birthmarks of essentially a neo-colonialist, statist disposition, and concerns of its founding fathers.'<sup>102</sup>

It is not difficult to accept, as Shivji canvasses, that the emergence of the African Charter was partly in response to Western condemnation of alleged brutal African regimes. Whether it was a mere ruse as he suggests may not be easy to determine. The end result was that the continent came up with a set of provisions aimed at protecting Africans both as individuals and as a group. Of course, Shivji's suggestion of the African Charter as an emergency lifeline to salvage the continent's image as well as qualify for aid, if valid, could weaken the Charter's claim to represent the African conception of human rights. Its emergence would then be best described as playing up to the master in order to earn little favours—a seemingly persuasive analogy given the conscious efforts to stay in line with international covenants. Still, Shivji's position is difficult to accept. It could be the case that African leaders wanted to salvage their image but it did need salvaging. It could also be true that Africa wanted to qualify for aid. These, however, are not the important questions. What is necessary to be established is whether the African Charter was important for Africa at that time and whether its provisions favoured the masses more than the leaders. As has been noted, this was a period of oppressive regimes and interstate wars as well as a pervasive ideology of non-interference in states' domestic affairs. Military juntas—products of often bloody coups—were known to come into power and suspend the constitution. Oppositions were often silenced and the judiciary was in the ruler's palm. Thus the African Charter, though largely declaratory, was a

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<sup>100</sup> Shivji (n 37) 94.

<sup>101</sup> Amin, Nguema and Bokasa.

<sup>102</sup> Ibid.

common stand against national oppression. Even where state agencies failed and national laws were no longer effective, Africans were provided with a regional institutional system to check and address cases of human rights violations.<sup>103</sup> Equally crucial were the provisions for socio-economic rights. Despite being slightly optimistic, they reflected the needs of millions of impoverished Africans. Even though some of these provisions seemed to represent Western ideals and could qualify African countries for aid, principles of human and socio-economic rights quite matched the African situation such that they could be adapted as part of the foundation of African human rights jurisprudence.

Any theory of subservience and platitude of the African Charter may not detract from its validity if it is widely accepted as representing the African conception of rights by the various countries that make up the African Union (AU). In what can be viewed as a demonstration of acceptance of the Charter, all African countries (with the exception of Morocco<sup>104</sup> and South Sudan which became independent in 2011) have signed and ratified the charter.<sup>105</sup> Some countries have even taken the further step of incorporating the Charter's provisions into domestic legislations.<sup>106</sup> Nigeria's Supreme Court has held in a case that the African Charter was superior to domestic legislation even though the Court rejected the argument that the Charter was superior to the Nigerian constitution.<sup>107</sup> The Court based its decision on the fact that the Charter had been enacted into law by the country's legislature. On its superior status to other legislations, the court stated:

[I]f there is a conflict between it and another statute, its provisions will prevail over those of that other statute for the reason that it is presumed that the legislature does not intend to breach an international obligation.

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<sup>103</sup> The adequacy and acceptance of this system will be examined in future chapters.

<sup>104</sup> Morocco withdrew in 1985 following the admittance in 1984 of the disputed state of Western Sahara.

<sup>105</sup> The African Commission on Human and Peoples' Rights, <http://www.achpr.org/instruments/achpr/ratification/> accessed 15 March 2014.

<sup>106</sup> For instance, Nigeria incorporated the Charter through the African Charter (Ratification and Enforcement) Act cap 10, Laws of the Federation of Nigeria, 1990.

<sup>107</sup> *Abacha v. Fawehinmi* [2001] AHRLR 172.

The court went on to agree with the lower courts' decisions that the Charter possessed 'a greater vigour and strength than any other domestic statute.'<sup>108</sup>

The African Charter has also impacted on countries that have not implemented such domestic translations. For instance, in the case of *New Patriotic Party v. Inspector General of Police*,<sup>109</sup> the Ghanaian Supreme Court partly relied on the Charter to hold as unconstitutional a legislation which required a police permit for a demonstration. The court stated that even though Ghana was not, at the time, a signatory to the African Charter, member States of the OAU were expected to recognise the rights, duties, and freedoms enshrined therein and to undertake to adopt legislative or other measures to give effect to the rights and duties. The Court further stated that the fact that Ghana had not passed specific legislation to give effect to the Charter did not mean that the Charter could not be relied upon. Also, in their decisions, sub-regional courts of the Economic Community of West African States (ECOWAS), East African Community, and South African Development Community, make references to specific provisions of the Charter.<sup>110</sup> The African Charter has thus developed an authoritative status and commands general reference on matters of human rights in the continent.

Even though the position of the African Charter can be further strengthened,<sup>111</sup> its status as the official position of human rights on the continent can hardly be denied. Given that the Charter professes to set out the African standard of right and has been accepted and ratified by a significant number of African states, it is argued that it should necessarily form the basis for any critique on the theory and practice of human rights on the continent especially in the light of arguments on the role of culture and regionalism in the definition and interpretation of human rights.

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<sup>108</sup> Ibid.

<sup>109</sup> [2001] AHRLR 138.

<sup>110</sup> See Viljoen (n 92).

<sup>111</sup> Through, for instance, legislative adoptions in every member state.

## 2.6 Conclusion

This chapter set out to explain and establish the role of the African Charter as providing the standard for human rights in Africa and the basis for any such assessment on the subject. It did this by analysing arguments on universalism and cultural relativism and by explaining the role of culture in the development and definition of human rights in different societies—a peculiarity that lends credence to the immanent critique methodology. The chapter then traced the history of the African Charter and its underlying *raison d'être* of charting a human rights path for the continent. It was argued that the Charter, while espousing African communitarian and group standards, also adopts a moderate relativism or 'cut and mix' approach to western liberal ideas. These have been assimilated into the African system through a process of acculturation and now form part of that system. Thus, while there may have been a few criticisms of the Charter's existence in the past, there is no doubt that it is currently the most authoritative source of human rights in Africa. It is on the basis of these arguments that the Charter has been chosen as representing the internal human rights standards of the African people and therefore constituting the basic framework for an immanent critique of the region's human rights system.

By clarifying and establishing the status of the African Charter as the basis of human rights in the continent, the stage is then set for a critique of the system and practice of human rights based on this charter. As has been explained in the previous chapter, this avoids the difficulties and resistance often associated with the application of perceived external transcendental standards. It is by assessing the practice and implementation of the Charter that questions on its suitability and practicability can be resolved. Thus, rather than accord the Charter the status of perfection, such assessment permits both theoretical and practical reforms.

Following in a progressive fashion, the next chapter analyses the contents of the Charter with a view to establishing its normative and institutional standards. It is on the basis of these standards that future analyses on implementation and reforms will be done.

## **CHAPTER 3**

### **3 A CRITICAL ANALYSIS OF HUMAN RIGHTS AND RESPONSIBILITIES AS CONTAINED IN THE AFRICAN CHARTER AND THE EXISTING REGIME FOR THE ENFORCEMENT OF HUMAN RIGHTS IN AFRICA.**

This chapter proceeds onto the second stage of immanent critique as outlined in the methodology section by examining the substantive provisions of the Charter. The aim is to ascertain and delineate the conceptual framework of the Charter in order to set the stage for future evaluations of its implementation. This analysis of the Charter is split into two parts:

- Discussion on rights, duties and responsibilities including references to the additional Protocol on women:<sup>1</sup> This part examines the normative contents of the African Charter with emphasis on its subdivision of rights namely civil and political rights, socio-economic rights, and peoples' rights; also, the additional protocol on women's rights that makes specific provisions for rights tailored to the peculiar situation of women in Africa. The concept of duties will also be briefly examined to highlight the distinctive communal spirit of the Charter.
- Discussion on the machinery for the protection of these rights: This part sets out the regional machinery charged with promoting and protecting these rights. These include the African Commission and the African Court.

The next sections will examine the Charter's approach and classifications of rights, as well as the status accorded to these rights.

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<sup>1</sup> The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

### **3.1 Human and Peoples' Rights in the Charter**

Human rights discourse can be said to have, over the years, developed three classifications of rights namely: civil and political rights; economic, social and cultural rights; and group rights. It appears, from the time of the Universal Declaration, that initial priority was accorded to first-generation civil and political rights. This hierarchy of the three generations of rights was especially demonstrated in the dual approach to human rights protection adopted by the United Nations General Assembly in the drafting of an International Bill of Rights in 1966. The original idea had been for the creation of an International Bill of Rights comprising a Declaration, a Covenant, and Measures of Implementation. However, member states could not agree on this goal especially regarding the equal status of negative civil and political rights and positive socio-economic rights, resulting in the drafting of two distinct instruments: the International Covenant on Civil and Political rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). This bifurcation, clearly captured in the creation of two covenants, appeared to group human rights into those requiring immediate implementation (civil and political rights) and those that needed to be realised progressively depending on the individual capacity of the member states (economic, social and cultural rights). It is difficult to argue against this interpretation from an examination of the provisions of the two Covenants. While the ICCPR mandates state parties to give immediate effect to the rights recognised in the Covenant, the ICESCR provides for progressive realisation of the rights contained therein thereby highlighting the relative lack of urgency in the implementation of that group of rights.<sup>2</sup>

The African Charter adopts a different approach to the issue of generations or hierarchy of rights. Rather than highlight the difference in these rights, such as through provisions subjecting socio-economic rights to the availability of resources, the African Charter stressed the harmony and synergy of the different generations of rights. In its Preamble,

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<sup>2</sup> See Rhona Smith, *Textbook on International Human Rights* (OUP 2013) 43.

the African Charter states that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality. Also, the satisfaction of economic, social and cultural rights, in the Charter's view, was a guarantee for the enjoyment of civil and political rights.<sup>3</sup>

The African Charter is peculiar in the absence from the document of a clear distinction between generations of rights such as civil and political rights and socio-economic rights. All rights contained therein come under the heading 'Human and Peoples' Rights'. The only sign of a division is in the order of listing of the rights which starts with traditional civil and political rights before proceeding to socio-economic and group rights. But even here, the latter two appear to be fused such that most group rights are only extensions of socio-economic rights to groups and peoples. The significance of the Charter's approach will be examined in later parts of this chapter. To set the stage for this and other analysis, a general overview of the normative contents of the Charter is necessary. Articles 2-14 provide for such rights as: right to freedom from discrimination, right to equality before the law and equal protection of the law, right to life, prohibition of torture and cruel, inhuman and degrading treatment, right to fair trial, right to freedom of conscience, right to freedom of association, right to free movement, right to participate in government, and right to property. From Article 15, the Charter provides for socio-economic and group rights. These include right to work, right to health, right to education, right to self-determination, right to economic, social and cultural development, and right to free disposal of wealth and natural resources. As already highlighted, the latter three rights have elements of both second and third generation rights in that they are practically socio-economic rights owed to collectives or groups rather than individuals. The near lack of distinction between these two groups of rights, it is argued, is a strong testament to the Charter's jettisoning of the generational classification of rights.

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<sup>3</sup> African Charter on Human and Peoples' Rights OAU Doc. CAB/LEG/67/3 rev. 5; (1982) 21 I. L. M. 58, Para 7.

The next sections will briefly examine the content and meaning of some these rights and then proceed to analyse some of the distinctive features of the Charter and what they mean for the development of the region's normative human rights framework.

### **3.1.1 Civil and Political Rights**

The African Charter, like most similar instruments, provides for individual civil and political rights. As discussed in Chapter 2, the inclusion of these rights was invariably influenced by the existence of international treaties guaranteeing them as well as pressure from the western and international communities on African countries to stem human rights abuses which were often in the form of violations of individual civil and political rights. Some of these rights are examined below.

#### *Equality and Non-Discrimination*

Article 2 of the African Charter provides that every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. Furthermore, Article 3 guarantees equality before the law by stating that every individual is equal before the law and shall be entitled to equal protection of the law. These interlinked provisions are natural offshoots of the universal human rights doctrine that rights accrue to every person by virtue of his or her existence as a human being. Their importance in the African context is evidenced by the need to abolish discriminatory Caste systems and protect members of minority groups as well as women and children. Complementing this provision, Article 12(5) of the Charter prohibits the mass expulsion of non-nationals whether aimed at national, racial, ethnic or religious groups. The African Commission has had the opportunity to apply this principle in the case of *Rencontre Africaine pour la Defense de Droits de L'Homme v. Zambia*<sup>4</sup> where 517 West Africans were expelled from Zambia some of whom had been kept in

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<sup>4</sup> Communications No 71/92 (1996).



administrative detention for over two months. The Commission held that the mass deportation of the individuals, including their arbitrary detention and deprivation of the right to have their cause heard, constituted a flagrant violation of the Charter.

### *Right to Life, Dignity, and Integrity*

Article 4 of the Charter provides that every person shall be entitled to respect for his life and the integrity of his person. The Commission has stated that the right to life is the fulcrum of all other rights and the fountain through which other rights flow. Thus, any violation of this right without due process amounts to an arbitrary deprivation of life.<sup>5</sup> The Commission has adopted a more pragmatic step of holding a state in violation where a person's life is endangered even though death has not resulted. For instance, in a case against Nigeria,<sup>6</sup> the denial of medication to a prisoner to the extent that his life was seriously endangered was considered to be a violation of the right to life, even though this had not caused his death. Also, in *Kazeem Aminu v. Nigeria*<sup>7</sup>, it was held that a series of arrests and detentions could in themselves constitute a violation of Article 4 even though there was no actual loss of life. Such an approach is significant in the African context given, as will be seen in the next chapter, the penchant for dictatorial regimes that naturally seek to silence perceived opposition groups and individuals through arrests and detentions.

### *Prohibition of Torture and Inhuman Treatment*

Article 5 of the Charter grants every individual the right to the respect of the dignity inherent in a human being and to the recognition of his or her legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment are prohibited. In its interpretation of this provision, the Commission has been willing to consider other external standards and

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<sup>5</sup> *Forum of Conscience v. Sierra Leone*, Communications No 223/98 (2000).

<sup>6</sup> *International PEN and Others v Nigeria*, Communications No 137/94 (1998).

<sup>7</sup> Communications No 205/97 (2000).

decisions. One such example was in the case of *Curtis Francis Doebbler v. Sudan*<sup>8</sup> where security agents and policemen beat up and arrested some students who were having a picnic by a River Bank. The students were alleged to have violated public order contrary to national laws<sup>9</sup> for not being properly dressed and acting in an immoral manner. They were convicted and sentenced to fines and/or lashes, a popular type of punishment in Sudan. It was alleged, on behalf of the students, that this punishment was grossly disproportionate and constituted cruel, inhuman and degrading treatment. The Commission found the acts of the Sudanese police to be in violation of Article 5 of the Charter and recommended the abolition of the penalty of lashes. In reaching this decision, the Commission considered, inter alia, the decision of the European Court of Human Rights in *Tyler v. United Kingdom*,<sup>10</sup> where it was held that even lashings that were carried out in private, with appropriate medical supervision, under strictly hygienic conditions, and only after the exhaustion of appeal rights violated the rights of the victim. The Commission stated that there was no right for individuals, and particularly the government of a country, to apply physical violence to individuals for offences. Such a right, in its view, would be tantamount to sanctioning state-sponsored torture under the Charter.

The impact of this decision is crucial not only in assessing possible violations but also in appreciating the Charter's role, as interpreted by the Commission, in ensuring regional standards and regulating national legislation. It is also worth noting the reference to the European Court of Human Rights signifying a more general (or 'universal') leaning as far as the interpretation of negative civil and political rights are concerned. On face value, this may initially signify a departure from African cultural norm. However, it may be argued that such an approach is permitted, or even envisaged, by Article 60 of the Charter which allows the Commission to "draw inspiration from international law on human and peoples' right". Thus, regardless of the religious backgrounds of some of its countries which apply Sharia law (like Sudan in this case), the Commission appears more

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<sup>8</sup> Communication Nos 236/2000 (2003).

<sup>9</sup> Criminal Law of 1991, art 152.

<sup>10</sup> Application No 5856/72, European Court of Justice (1978).

inclined to adopt and apply the more liberal and modern views on such issues as corporal punishment. Just as was argued in the previous chapter, it is clear from this case that such an approach is to avoid, or at least curtail, the excesses of brutal regimes that have blighted Africa's recent past. The allusion to the dangers of permitting 'state-sponsored torture' clearly shows the strong reluctance of the Commission to allow states any room for discretion on such an important and frequently abused right regardless of cultural or religious practices in those states. As seen in the broad interpretation of the right to life, the Commission appears committed to emphasising the sanctity of the person and enforcement of democratic norms.

The above analysis should not in any way suggest that the principles of Islamic law are contrary to the spirit or intentions of the Charter. Quite to the contrary, it has been argued by Baderin that, instead of seemingly jettisoning Islamic law in this particular case, the Commission could have found Sudan in violation of the Charter based on a harmonious interpretation of the Charter and Islamic law, the latter being one of the continent's 'principal legal traditions'.<sup>11</sup> This view is therefore not a criticism of the Commission's ultimate decision but of the rationale or method of reaching that decision which appears to raise questions about the compatibility of the Charter's provisions with general principles of Islamic law.

### *Right to Liberty*

Article 6 provides that every individual shall have the right to liberty and security of his or her person. In particular, no one may be arbitrarily arrested or detained. In defining arbitrariness, the Commission has stated that this would include elements of inappropriateness, injustice, lack of predictability, and due process of law. Thus an arrest or detention may be legal according to domestic law but arbitrary (and therefore illegal) by reason of its inappropriate, unjust, or unpredictable nature.<sup>12</sup> Accordingly, the

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<sup>11</sup> Mashood Baderin, 'Recent Developments in the African Regional Human Rights System' (2005) 5(1) HRLR 133-137.

<sup>12</sup> *Article 19 v The State of Eritrea*, Communication No. 275/ 2003 (2007).

Commission has held that the massive and arbitrary arrests of office workers, trade unionists, Roman Catholic bishops and students violated this article.<sup>13</sup> As seen in the elaboration on Article 2, such persistent arrests may also amount to violations of the right to life.

### *Right to Fair Hearing*

Article 7 provides for the right to have one's cause heard including the right to an appeal, presumption of innocence, right to defence, and right to be tried within a reasonable time by an impartial court or tribunal. This article also prohibits retroactive legislations. Given Africa's history of military coups and dictatorships, this right has been important in ensuring the functioning of the judiciary. In the case of *Civil Liberties Organisation v. Nigeria*<sup>14</sup> the military government of Nigeria enacted a decree which not only suspended the country's constitution but also ousted the jurisdiction of the courts and provided that no decree promulgated after December 1983 could be examined in any Nigerian Court. The Commission ruled that the ousting of the jurisdiction of the Nigerian courts constituted an attack of 'incalculable proportions' on Article 7. The Commission stated that an attack of this sort on the jurisdiction of the courts was 'especially invidious because, while being a violation of human rights in itself, it permitted other violations of rights to go unredressed.

### *Freedom of Conscience and Religion*

Freedom of conscience and the profession and free practice of religion are guaranteed under Article 8 of the Charter. In *Amnesty International and Others v Sudan*<sup>15</sup> the Commission held that Tribunals that applied only Sharia Law were not competent to judge non-Muslims and that everyone had a right to be tried by a secular court if they so wished.

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<sup>13</sup> *Achutan (on behalf of Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v. Malawi*, Communication Nos 64/92, 68/92, and 78/92 (1995).

<sup>14</sup> Communication No 129/94 (1995).

<sup>15</sup> Communication Nos 48/90, 50/91, 52/91, 89/93 (1999).

### *Freedom of Expression*

Article 9 guarantees every individual the right to express and disseminate his or her opinions within the law. This is one of the few provisions in the Charter with a clawback clause and without further provisions on the limit of such clause. No doubt sensing the danger in such a wide provision and the further need to strengthen freedom of expression the African Commission, in 2002, adopted the Declaration of Principles on Freedom of Expression in Africa.<sup>16</sup> This Declaration was intended to supplement the provisions of Article 9 and make more detailed provisions on the ingredients of the freedom of expression and right to information. In contrast to the earlier provision allowing derogation 'according to law', the Declaration states that restrictions to this freedom must be provided by law, serve a legitimate interest and be necessary in a democratic society.<sup>17</sup> While this provision is by no means as elaborate as, say, its counterpart provision in the European Convention on Human Rights,<sup>18</sup> it at least tackles the ambiguity in Article 9 which, at first sight, may appear to make the freedom subject to any national law.

It is rather interesting that the Charter did not expound on this right given the importance of the freedom of expression in democratic societies and the fact that the Charter was a direct response to the ills of autocratic governments. Such lacuna has necessitated a proactive stance by the Commission which has ruled that references to 'law' in this and similar provisions are allusions to international law as opposed to national law. The Commission made this clarification in the case of *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project / Nigeria*, where the Military government of Nigeria proscribed two magazines and ten

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<sup>16</sup> African Commission, Declaration of Principles on Freedom of Expression in Africa, <https://www1.umn.edu/humanrts/achpr/expressionfreedomdec.html> accessed April 29 2016.

<sup>17</sup> *ibid* Para 2.

<sup>18</sup> Art 10(2) of the Convention provides for more specific conditions when this right may be restricted. These include that the conditions be in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

newspapers and embarked on frequent seizures of copies of magazines critical of the government's decisions and arrest of newspaper vendors selling such magazines or papers. In its decision, the Commission stated:

According to Article 9.2 of the Charter, dissemination of opinions may be restricted by law. This does not mean that national law can set aside the right to express and disseminate one's opinions; this would make the protection of the right to express one's opinions ineffective. To allow national law to have precedent over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter.<sup>19</sup>

It is commendable that the Commission has stepped in to clarify this and other clawback provisions. This, of course, is the only logical interpretation as the reverse would amount to subjecting this freedom to possible tyrannical legislations.<sup>20</sup>

#### *Freedom of Association*

Article 10 of the Charter makes provision for the individual's right to free association provided that such individual abides by the law. Considering the apparent ambiguity of this provision and the possible room for violation, the Commission, in 1992, adopted the Resolution on the Freedom of Association.<sup>21</sup> The resolution requires that state authorities refrain from enacting provisions that would limit the exercise of this right and other fundamental rights.

#### *Freedom of Movement*

The Charter guarantees the individual's right to freedom of movement and residence within the borders of a state. The individual also has the right to leave any country including his or her own, and to return to that country subject however to restrictions

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<sup>19</sup> Media Rights Agenda and Others v. Nigeria, African Commission on Human and Peoples' Rights, Comm. Nos. 105/93, 128/94, 130/94 and 152/96 (1998) Para 66.

<sup>20</sup> Chapter 4 highlights instances of such tyrannical legislations.

<sup>21</sup> African Commission, <http://www.achpr.org/sessions/11th/resolutions/5/>, accessed 17 March 2017

provided for by law for the protection of national security, law and order, public health or morality. It is important to note here, in the light of earlier discussions on the freedom of expression, the relatively specific contents of the permissible derogations from this freedom. In *Rights International v Nigeria*<sup>22</sup> where a person was forced to flee the country and take on refugee status abroad due to threats of abduction by perceived agents of the government, it was held by the Commission that his freedom of movement had been infringed.

### *Right of Political Participation*

Article 19 provides for the citizen's right to participate freely in the government of his or her country, either directly or through freely chosen representatives in accordance with the provisions of the law. Furthermore, the individual is entitled to equal access to the public service and public property of his or her country. The Commission has defined this provision as entailing, among other entitlements, the right to vote for the representative of one's choice. Thus the annulment by the Nigerian government of elections internationally adjudged as free and fair was held to be a violation of the rights of the Nigerian people.<sup>23</sup>

### *General Points on Civil and Political Rights*

The Charter's approach to civil and political rights mirrors the general position in the Universal Declaration and International Covenant on Civil and Political Rights. To this extent, therefore, there is little distinction in the approach and content of this group of rights except, perhaps, from the Commission's more modern definition of some of the rights.<sup>24</sup> By upholding these rights, African countries demonstrate their acceptance of these universal principles as well as their importance in ensuring the future development of the continent. There are however a number of concerns that have been

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<sup>22</sup> Communication No 215/98 (1999).

<sup>23</sup> Constitutional Rights Project and Civil Liberties Organisation v. Nigeria, Communication 102/93 (1998).

<sup>24</sup> For instance the right to life.

raised on the Charter's content of civil and political rights. Aside the already addressed issue of clawback clauses, the Charter has been criticised for its lack of clarity on certain provisions and even failure to provide for some important rights. For instance, it has been argued that the formulation of Article 7 of the Charter—Right to a fair trial—is inadequate. The Charter, it is argued, leaves the answer to the question whether many of the crucial aspects of a fair trial need to be observed up to the creative interpretation of the Commissioners.<sup>25</sup> The article merely includes the right to a defence, appeal, presumption of innocence, and trial within a reasonable time. However, Heyns argues that crucial aspects of a fair trial like the right to a public hearing, the right to interpretation, the right against self-incrimination and the right against double jeopardy need to have been included.<sup>26</sup> The Commission has however interpreted the Charter to include some of these elements.<sup>27</sup>

Attention has also been drawn to Article 14 which guarantees the right to property. The Charter provides that this right may only be encroached upon 'in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.' Gittleman argues that by not restricting the state's ability to call virtually anything in the 'public need', nor setting forth guidelines clarifying the situation in which a government may exercise eminent domain, the Charter allows a state to take property absent local law to the contrary.<sup>28</sup>

The Charter's equivocation on a number of substantive issues seems to have been effectively met by a proactive Commission which by its procedures and jurisprudence define the nature and delimitations of these rights. An example of one such case is in the Commission's interpretation of the clause 'according to the law' explained above.<sup>29</sup> Another instance is the Commission's view on the absence of a derogation clause in the

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<sup>25</sup> Christof Heyns, 'The African Regional Human Rights System: In Need of Reform' (2001) 1 AHRLJ, 155.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid 156.

<sup>28</sup> Richard Gittleman, 'The African Charter on Human and Peoples' Rights: A legal Analysis (1982) 22 VJIL 667, 700.

<sup>29</sup> See n 19.



Charter. In *Commission Nationale des Droits de l'Homme et des libertes v. Chad*,<sup>30</sup> the Commission interpreted the absence of a derogation clause from the Charter to mean that the Charter did not permit derogations.

Aside the issue of ambiguity, the Charter has also been criticised for failing to make any provisions for certain rights. For instance, it has been pointed out that the Charter fails to provide for the right of citizens to vote,<sup>31</sup> a rather conspicuous absence given the prevailing situation in the continent at the time the Charter was drafted. It is argued, however, that this right is adequately protected under Article 13 which allows every citizen the right to participate freely in the government of his country whether directly or through freely chosen representatives.

### **3.1.2 Socio-economic Rights**

The Charter provides for a number of socio-economic rights owed to either individuals or groups. With regard to the former, the Charter makes provisions for only three rights: the right to work,<sup>32</sup> the right to health,<sup>33</sup> and the right to education.<sup>34</sup> On the latter side are the right to self-determination,<sup>35</sup> right to dispose of wealth and natural resources,<sup>36</sup> the right to economic, social and cultural development,<sup>37</sup> and the right to a satisfactory and favourable environment.<sup>38</sup> The first group of rights are briefly discussed below while the latter group will be examined in discussions on group and peoples' rights. It is also worth noting that these rights have been subsequently elaborated by the Pretoria Declaration on Economic, Social and Cultural Rights in Africa.<sup>39</sup>

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<sup>30</sup> Communication 74/92.

<sup>31</sup> *ibid* 699.

<sup>32</sup> Art 15.

<sup>33</sup> Art 16.

<sup>34</sup> Art 7(1).

<sup>35</sup> Art 20.

<sup>36</sup> Art 21.

<sup>37</sup> Art 22.

<sup>38</sup> Art 24.

<sup>39</sup> African Commission, <http://www.achpr.org/instruments/pretoria-declaration/>, accessed 17 March 2017

### *Right to Work*

Article 15 of the Charter confers on individuals the right to work ‘under equitable and satisfactory conditions’ and the entitlement to equal pay for equal work. In *Institute for Human Rights and Development in Africa v Angola*,<sup>40</sup> 14 foreign mineworkers were arrested and deported on the grounds that foreigners were not permitted to engage in mining activities in Angola. This was despite the fact that the victims had the necessary official documents such as passports, visas, work and residence permits and were even mandated to make monthly payments for their work permits. The Commission held that their abrupt expulsion without due process compromised the victims’ right to work under equitable and satisfactory conditions. The Commission has also found a violation of the right to work in a case where the respondent state closed down newspaper offices and confiscated printing equipment.<sup>41</sup>

### *Right to Health*

By Article 16 of the Charter, every individual shall have the right ‘to enjoy the best attainable state of physical and mental health’. Furthermore, states are to take ‘necessary measures’ to protect health and ensure that people receive medical attention when they are sick. Thus the Commission has held in a case that the failure of the government to provide safe drinking water and medicines amounted to a violation of this provision.<sup>42</sup>

The expression ‘best attainable state of physical and mental health’ however poses the challenge of interpretation as the Charter does not set out its meaning. It has therefore been argued that this provision provides little guidance on the exact obligations of the state and appropriate expectations by individuals.<sup>43</sup> The Commission has however

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<sup>40</sup> 292/04.

<sup>41</sup> 284/03 : Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Zimbabwe.

<sup>42</sup> 25/89-47/90-56/91-100/93 : Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah/DRC.

<sup>43</sup> Shedrack Agbakwa, ‘Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights (2002) 5 YHRDLJ 177, 193.

determined that this provision imposes an obligation on states to take 'concrete and targeted steps', while taking full advantage of their available resources, to ensure the full realisation of this right.<sup>44</sup>

### *Right to Education*

Article 17(1) of the Charter simply states that everyone shall have the right to education. There is no further expatiation of this right making it difficult to ascertain or measure the implementation of this right especially in the context of this research. It is not clear for instance whether, like the ICESCR, states are obliged to make primary education compulsory and secondary/tertiary education only 'generally available and accessible'.<sup>45</sup> However, it would appear from the general disposition in State Reports and Concluding Observations,<sup>46</sup> and the language of Article 60 of the Charter,<sup>47</sup> that this is the case.

The protection of this right is not limited to positive provisions by the state as the state is further required to refrain from taking steps that could infringe on it. Thus in *Free Legal Assistance Group v Democratic Republic of Congo*, the Commission held that the closure of universities and secondary schools amounted to a violation of this provision.

### **3.1.3 Socio-economic Rights: Enforceable or Not?**

Having identified the socio-economic rights protected under the Charter, an important issue that arises is their level of enforceability as positive rights. Thus, can it be said that these rights are justiciable? It would appear that the Charter intended for them to be so. Two reasons justify this position. First, the Charter makes no express classification of rights. As a matter of fact, the drafters of the Charter had done away with a first draft that distinguished between socio-economic and other rights.<sup>48</sup> This in itself shows a

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<sup>44</sup> Purohit and Moore v. The Gambia, 241/01. See Section 6.4.2.

<sup>45</sup> International Covenant on Economic Social and Cultural Rights, art 13.

<sup>46</sup> See Chapter 4.

<sup>47</sup> This Article provides that the Commission is to draw inspiration from regional and international human rights instruments.

<sup>48</sup> Frans Viljoen, *International human rights law in Africa* (OUP 2012) 215.

strong intent against such classifications. Secondly, the Charter clearly states in its Preamble that civil and political rights cannot be dissociated from socio-economic rights as the latter are necessary for the fulfilment of the former.

Since the adoption of the African Charter, commentators have presented divergent views on the extent of enforceability of socio-economic rights as envisaged under the Charter. While many have lauded the Charter's approach as welcome in the light of deplorable conditions of living of many Africans, there have been reservations about the practical enforcement of this approach. Thus, while praising the merits of this position, it has been often opined that given the realities of economic development in most African countries, socio-economic rights in the Charter may be regarded as merely exhortatory.<sup>49</sup>

On the other hand, it has been argued that socio-economic rights are as unequivocally justiciable as any other rights in the Charter.<sup>50</sup> The African Commission would undoubtedly be granting states a great latitude if economic and social rights were promoted at the expense of civil and political rights as it is the Commission's aim to strike a healthy balance between the two.<sup>51</sup> This is because the African Charter has already undone the tripartite division of rights by including rights from all three generations in one document. Rather than see the poor economic state of African countries as impeding justiciability, Viljoen opines that the Charter's position is a response to the prevailing situation of dire poverty and 'exploitation by kleptocratic elites'.<sup>52</sup> The justiciability of economic rights, he argues, was an acknowledgement that accountability through the law was part of the solution to Africa's economic woes.<sup>53</sup>

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<sup>49</sup>Obinna Okere, 'The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems' (1984) 2 HRQ 141.

<sup>50</sup> Viljoen (n 46) 218; Chidi Odinkalu, 'Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights, in Malcolm Evans and Rachel Murray (eds) *The African Charter on Human and People's Rights: The System in Practice, 1986–2000* (CUP 2002), Shedrack C. Agbakwa (n 41) 177.

<sup>51</sup> Gittleman (n 27) 687.

<sup>52</sup> Viljoen (n 46) 214.

<sup>53</sup> *ibid* 215.

That the Charter does not make the fulfilment of any of its provisions dependent on 'available resources' or 'progressive realisation' has been put forward as an argument for the justiciability of socio-economic rights. Unlike the ICESCR, the African Charter avoids the incremental language of progressive realisation in guaranteeing socio-economic and cultural rights except in Article 16(1) which guarantees the best attainable state of physical and mental health.<sup>54</sup>

In a direct criticism of the view that socio-economic rights be only promotional based on economic crises of African states, Agbakwa argues strongly that recognition and enforcement of these rights catalyse development and are inextricable from it. Poor economic conditions of many African states, he contends, do not justify outright non-enforcement of economic, social and cultural rights. Even if underdevelopment were to become a huge impediment, it would merely affect, in his view, the extent to which these rights can be realised and not justify outright non-justiciability. Most armed conflicts in Africa, he argues, are caused by the denial of socio-economic and cultural rights to the people who then embark on armed struggles to fight for these rights.<sup>55</sup>

The seeming 'uncertainty' by some commentators about the enforceability status of socio-economic rights is not very convincing given the Charter's obvious attempt to downplay any classifications of rights. In the absence of a special tag or exemption clause, it is reasonable to infer that the Charter intended for them to be enforceable. Evidence of such an intent may also be gleaned from the Commission's Concluding Observations on State Reports where state parties are continually tasked on the improvement of living conditions regardless of the economic conditions of these states.<sup>56</sup> This view is backed by the 2009 decision of the ECOWAS<sup>57</sup> Court of Justice

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<sup>54</sup> Odinkalu (n 48) 195.

<sup>55</sup> Agbakwa (n 41) 177.

<sup>56</sup> See Chapter 4.

<sup>57</sup> Economic Community of West African States.

(ECCJ) in a case against Nigeria.<sup>58</sup> The Nigerian government had, in addressing a complaint on its failure to adequately implement the country's Basic Education Act, argued that the educational objective in the national constitution was non-justiciable. However, the ECCJ dismissed this position pointing out that it was 'well established' that the rights guaranteed by the African Charter were justiciable. Thus, while the argument against the enforceability of these rights based on the economic situation of many African countries has its merits, it is argued that this should be seen only as a challenge and not as defining the intended status of these rights. Accordingly, for the purpose of measuring compliance, states must be seen as having a duty to implement these rights. Whether this feat is achievable as well as the most practical ways of achieving it will be addressed in subsequent chapters.

#### **3.1.4 Peoples' Rights**

The Charter is peculiar in its approach to peoples' rights. These are contained in Articles 19-24 and provide for various rights that accrue to 'all people'. The Charter makes the collective the holder of these rights rather than the individual. Thus, the 'people' as rights holder may be a community, a population of the country as a whole, or even everyone living on the continent.<sup>59</sup> The concept of peoples' rights, and the significant portion of the Charter dedicated to it, is reflective of the communal and people-oriented nature of Africa. It also reflects the multiethnicity and cultural diversity present in most African countries. For instance, Nigeria alone has over 250 ethnic groups<sup>60</sup> while Cameroon has more than 230.<sup>61</sup> Such is the deep-seated feeling of communal spirit that it has been suggested, as shown in Chapter 2, for Africa to jettison the 'imperialist'

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<sup>58</sup> See Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria and Universal Basic Education Commission, No. ECW/CCJ/APP/0808.

<sup>59</sup> Viljoen (n 46) 226.

<sup>60</sup> World Bank, Nigeria: Socio-economic Overview (2014) <<http://www.worldbank.org/content/dam/Worldbank/Feature%20Story/japan/pdf/event/2014/Africa-Business-Seminar-100314.pdf>> accessed 08 June 2016.

<sup>61</sup> Republic of Cameroon, *Third Periodic Report of Cameroon within the Framework of the African Charter on Human and Peoples' Rights* (2013) 142 [http://www.achpr.org/files/sessions/54th/state-reports/3-2008-2011/staterep3\\_cameroon\\_2013\\_eng.pdf](http://www.achpr.org/files/sessions/54th/state-reports/3-2008-2011/staterep3_cameroon_2013_eng.pdf) accessed 15 December 2015.

notion of human rights for an African concept 'unreservedly in the interest of the people' and rooted in the perspective of class struggle.<sup>62</sup> By providing for a whole range of peoples' rights, the African Charter can be seen to fulfil, at least to some extent, this clamour for communitarianism and oneness. By giving room for their application in cases where indigenous and ethnic populations in Africa seek to establish their rights as a collective within the state, the provisions on peoples' rights serve the 'vital purpose' of accommodating class actions and recognising such claims as the right to self-determination within a sovereign state.<sup>63</sup>

#### *Rights of Peoples to Equality and Rights*

Article 19 of the Charter guarantees equality to all people. By this provision, all people shall enjoy the same respect and rights and shall be free from domination by another group. Granted that this provision may have originally been inspired by the continent's colonial history, the Commission has been quick to point out that this protection extends to both internal and external domination. Therefore, in a case against the government of Sudan,<sup>64</sup> the Commission found a violation of this article and stated that the people of Darfur did not deserve to be dominated by a people of another race in the same state.

#### *Right to Self-Determination*

By Article 20, all peoples shall have an 'unquestionable' and 'inalienable' right to self-determination. They shall have the freedom to freely determine their political status and pursue their economic and social development according to the policy that they have freely chosen. No doubt inspired by the continent's colonial history, the Article goes on to state that 'colonised or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognised by the international

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<sup>62</sup> Issa Shivji, *The Concept of Human Rights in Africa* (ABC 1989) 73.

<sup>63</sup> Barney Pityana, 'The Challenge of Culture for Human Rights in Africa: The African Charter in a Comparative Context' in Malcolm Evans and Rachel Murray (eds) *The African Charter on Human and People's Rights: The System in Practice, 1986–2000* (CUP 2002) 232.

<sup>64</sup> 279/03-296/05 : Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) / Sudan.

community'. Furthermore, such people shall have the right to assistance of other state parties to the Charter in their liberation struggles.

Interestingly, however, the Commission has been reluctant to extend this right to secessionist movements despite their large existence in many parts of Africa arguably owing to the political undertones and therefore applies a limited interpretation of this right. For instance, in *Congrès du peuple katangais v Democratic Republic of Congo*,<sup>65</sup> the Commission stated that the right to self-determination must be exercised taking into consideration other 'recognised principles' such as sovereignty and territorial integrity. It appears from the language of the Commission that principles of sovereignty and territorial integrity would only be jettisoned where there is concrete evidence of violation of human rights and denial, towards a particular people, of the right to participate in government.<sup>66</sup>

#### *Right to Free Disposal of Wealth and Natural Resources*

Article 21 provides that all people shall freely dispose of their wealth and natural resources. In the *Ogoni case*,<sup>67</sup> which concerned the impact of oil development activities on the Ogoni people living in the Niger delta area of Nigeria, the Commission found that the Nigerian Government violated, *inter alia*, the right of the Ogoni people to freely dispose of their wealth and natural resources. It articulated the scope of Article 21 in a way that resonated with separate provisions, notably in relation to property, health, and the environment, and recognised substantive rights which were not expressly mentioned in the Charter, such as the right not to be subjected to forced evictions.<sup>68</sup>

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<sup>65</sup> 75/92.

<sup>66</sup> *ibid*, Para 6.

<sup>67</sup> *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*, Communication 155/96 (2001).

<sup>68</sup> Gaetano Pentassuglia, 'Indigenous Groups and the Developing Jurisprudence of the African Commission on Human and Peoples' Rights: Some Reflections' (2010) 3 UCLHRR. 150, 155-156.



### *Right to Economic, Social and Cultural Development*

By Article 22 all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. In the *Endorois* case,<sup>69</sup> the Commission provided a first comprehensive interpretation of the right to development by a supranational adjudicatory body. The complaint revolved around the Kenyan government's eviction of hundreds of Endorois families from their land around the Lake Bogoria area in the Rift Valley to create a game reserve for tourism. The Endorois, an indigenous people had been promised compensation and benefits, but these were never fully implemented, and the community's access to the land was restricted to the discretion of the Game Reserve Authority. This prevented the community from practising their pastoralist way of life, using ceremonial and religious sites, and accessing traditional medicines. The Commission found that the Kenyan government had violated the Endorois' rights to religious practice, property, culture, the free disposition of natural resources, and development as variously protected under the African Charter.<sup>70</sup> The Commission stated that the lack of consultation with the community, the subsequent restrictions on access to the land, and the inadequate involvement in the process of developing the region for use as a tourist game reserve had violated the community's right to development. Also, the Commission found that the Kenyan Government's Trust Land System violated the Endorois' right to property. The system allowed gradual encroachment onto Endorois land, and even though it allowed for compensation, it nevertheless violated property rights by effectively causing forced evictions. For these violations, the Commission recommended that the government recognise the right of ownership of the Endorois people, restitute to the Endorois their ancestral lands, compensate their losses, and ensure that the Endorois benefit from the royalties and employment opportunities within the game reserve.<sup>71</sup>

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<sup>69</sup> Centre for Minority Rights Development (Kenya) and another on behalf of the Endorois Welfare Council v. Kenya, Communication 276/2003.

<sup>70</sup> Arts 8, 14, 17, 21 and 22, respectively.

<sup>71</sup> International Network for Economic, Social and Cultural Rights, <http://www.escrnet.org/docs/i/1216218>, accessed 8 July 2014.

### 3.2 Communitarian Duties

A peculiar feature of the African Charter is its imposition of duties on states and individuals. In its Preamble, the Charter provides that the enjoyment of rights and freedoms implies the performance of duties on the part of everyone. This declaration subscribes to the communitarian perspective of rights and attendant duties. The communitarian philosophy is based on the premise that rights have limits and involve concomitant responsibilities. It has been described as 'the sane middle ground' between the 'extremes' of authoritarianism and libertarianism.<sup>72</sup> While communitarians support basic civil liberties, they fear that the ability to confront societal problems effectively is compromised by the claims of 'radical individualists' who would subordinate the needs of the community to the absolute fulfilment of individual rights. Thus, in addition to recognising individual human dignity, the communitarian also recognises the 'social dimension' of human existence and proposes an agenda to advance commonly held social values without unduly compromising individual rights.<sup>73</sup> The African Charter's provision and emphasis on duties can be interpreted as an adoption and development of this communitarian doctrine. Instead of a purely individualistic document that focuses on the individual and his/her rights, the African Charter stresses the importance of the family, social and community values by making provisions for duties owed to the family and state.

It has been correctly argued that the notion of duties originates in the American and Universal Declaration and is therefore not the novelty of the African Charter.<sup>74</sup> However, these duties are spelt out more elaborately in the African Charter than anywhere else.<sup>75</sup>

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<sup>72</sup> Robert Ackerman, 'Tort Law and Communitarianism: Where rights meet responsibilities' (1995) 30(4) WFLR 649.

<sup>73</sup> *ibid* 650.

<sup>74</sup> Chaloka Beyani, *Reconstituting the universal: human rights as a regional idea* (CUP 2012) 179

<sup>75</sup> Barney Pitso, (46) 229.

And the African Charter has certainly improved and developed the concept of rights and corresponding duties.

Article 25 of the Charter imposes on State Parties the duty to promote and ensure through teaching, education, and publication, the respect of the rights and freedoms contained in the Charter. There is also the duty to guarantee the independence of the courts and 'to allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights contained in the Charter'.<sup>76</sup> It is not clear what are the exact delimitations of the phrase 'to allow' and whether this entails merely creating an enabling environment for these institutions to operate or some more positive exertions like funding them.

Article 27 provides that every individual shall have duties towards his family and society, the state and other legally recognised communities and the international community. The Article does not state what exactly these duties are although these can be inferred from Article 29 which sets out duties of the individual. These are examined below.

### **3.2.1 Individual Duties in the Charter**

The Charter provides for individual duties to the family, community, and state. Article 29 provides that the individual has the duty to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, and to maintain them in case of need. He or she also has to serve the community by placing his or her physical and intellectual abilities at its service. There is also an emphasis on maintaining social and cultural values. An individual is therefore required to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of the society.

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<sup>76</sup> Art 26.

Duties owed the state include not to compromise the security of the state whose national or resident he is; to work to the best of his abilities and competence, and to pay taxes imposed by law; and to preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law.<sup>77</sup> It has been pointed out that the duties of the individual are traditionally 'moral' and generally not enforceable.<sup>78</sup> It is, however, important to note that some of these duties like the payment of tax and preservation of territorial integrity often carry the full force of the law.

The communitarian perspective adopted by the Charter has not gone unchallenged. It has been suggested, for instance, that the chapter on duties (Articles 27 – 29) represents perhaps the most elaborate limitations of the rights contained in the Charter.<sup>79</sup> Shivji describes the representation of duties as an ideological reflection of the authoritarian character of the African neo-colonial state.<sup>80</sup> Also, Mutua argues that the language of duties in the Charter underplays the force of rights because it emphasises the duty of the individual, rather than that of the state.<sup>81</sup> In a similar vein, Ankumah posits that being vaguely defined, the language of duties could be used to suppress individual rights such as freedom of conscience.<sup>82</sup> Furthermore, Hatem Ben Salem, at the time a member of the African Commission, suggested amending the Charter given the imposition of such 'heavy duties' on individuals.<sup>83</sup>

While they vary in their degrees of criticism, the above opinions appear to be anticipations of a potential conceptual clash between the provisions for rights on the one hand and duties on the other. The case has however been made for the

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<sup>77</sup> Art 29.

<sup>78</sup> Michelo Hansungule, 'The African Charter on Human and Peoples Rights: A Critical Review' (2000) 8 AYBIL 265, 294.

<sup>79</sup> Pityana (n 61) 229.

<sup>80</sup> Shivji (n 60) 98.

<sup>81</sup> Pityana (n 61).

<sup>82</sup> Evelyn Ankumah, 'Towards Effective Implementation of the African Charter' (1994) 8(3) IB 8, 60 cited in Barney Pityana (n 61).

<sup>83</sup> Pityana (n 61) 229.

compatibility of liberal and communitarian ideas. For instance, Scott<sup>84</sup> argues against the notion that liberal theory and communitarian morality are essentially incompatible. While liberal theory places a high value on personal choice and circumscribes the use by the state of its coercive powers to enforce communal norms, it does not follow that 'autonomous, liberal selves will [not] choose lives filled with deep commitment, lasting relationships, and social responsibility.'<sup>85</sup> She, therefore, argues that communitarian values and liberalism are not mutually exclusive, and share important commonalities. Buttressing this point Pityana argues that, far from creating an environment for a gratuitous invasion of rights, duties should be understood as reinforcing rights. It is, therefore, necessary, in his view, to make reference to duties because, in the modern global environment, the key performers are not necessarily the states but non-state actors. Also, the African Charter spells out duties in order to save the African system of human rights from over-dependence on individualism.<sup>86</sup>

In conclusion, it is opined that the provisions for duties reflect the communal and familial nature of the traditional African state and show that the Charter was specially crafted to reflect a Pan-African identity as opposed to a wholesome, uncritical adoption of western liberalism. Much as has been pointed out in Chapter 2, the provision for duties reflect the moderate relativist approach of the Charter which, in adopting liberal conceptions of individual civil and political rights, interspersed these with other provisions reflecting the continent's communal traditions and philosophy. It is such provisions as these that give the Charter its African flair and uniqueness.

### **3.3 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa**

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<sup>84</sup> Elizabeth Scott, 'Rehabilitating Liberalism in Modern Divorce Law' (1994) ULR 687

<sup>85</sup> *ibid* 688-89.

<sup>86</sup> Pityana (n 61) 230.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol) was created in 2003 as part of the work of the African Commission's Special Rapporteur on the Rights of Women in Africa. Even though women are equally addressed under the African Charter, it was thought to create a distinct instrument for them because:

Despite the ratification of the [African Charter] and other international human rights instruments by the majority of States Parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices.<sup>87</sup>

The Women's Protocol reiterates some of the rights contained in the Charter such as elimination of discrimination<sup>88</sup>, right to dignity<sup>89</sup>, and rights to life, integrity and security of the person<sup>90</sup>, 'though from the particular perspective of the lived experience of women and girls, which often tends to differ from that of men and boys.'<sup>91</sup> The Protocol also provides for rights that apply mainly to women within the African context such as the elimination of harmful practices such as female genital mutilation, equality in marriage, health and reproductive rights, the right to inheritance, and widows' rights.

The Women's Protocol is modelled to address particular issues facing women in Africa and, as is the case with the Charter, reflects particular African cultures and traditions. One instance of this is in the Protocol's approach to polygamous marriages. The 'universal' position as expressed by both the UN Human Rights Committee and CEDAW Committee is that polygamous marriages are incompatible with the woman's right to equality with men.<sup>92</sup> However, the Women's Protocol does not adopt such an outright

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<sup>87</sup> Women's Protocol, Preamble.

<sup>88</sup> Art 2.

<sup>89</sup> Art 3.

<sup>90</sup> Art 4.

<sup>91</sup> Treva Braun & Lucy Mulvagh, *The African Human Rights System: A guide for Indigenous Peoples* (Forest Peoples Programme, 2008) 18, [http://www.rightsandresources.org/documents/files/doc\\_1178.pdf](http://www.rightsandresources.org/documents/files/doc_1178.pdf) accessed 4 July 2014.

<sup>92</sup> See HRC General Comment 28, Equality of Rights between Men and Women, art 3 UN Doc. CCPR/C/21/Rev.1/Add.10 (2000); UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations, 1994, <<http://www.refworld.org/docid/48abd52c0.html>> accessed 22 June 2016.

prohibition. Instead, while encouraging states to enact laws that ‘encourage’ monogamy as the ‘preferred’ form of marriage, the Protocol provides that ‘the rights of women in marriage and family, including in polygamous marital relationships’ must be promoted and protected.<sup>93</sup> In further explaining this approach, Baderin states:

Practically, it would be very difficult, if not impossible, to enforce a sweeping prohibition of polygamous marriages within most African societies, especially amongst the rural communities. The African states have, therefore, under the African Women’s Protocol, opted for the practical alternative of encouraging monogamy rather than prohibiting polygamy.<sup>94</sup>

In 2011 the Commission, for the first time, reached a decision on the merits in a case concerning the violation of women’s rights.<sup>95</sup> The complaint was filed on behalf of four women who were sexually abused during a demonstration in Cairo regarding a referendum on the amendment of the Egyptian Constitution. The complainants claimed that the first victim’s clothes were torn, documents seized and her private parts fondled. The second, third and fourth victims, all journalists covering the protest, were beaten and sexually harassed by unidentified men and security officers. It was also alleged that, when the victims lodged their complaints, they received threats to withdraw the case. Their complaints were subsequently rejected on the basis that the offenders could not be identified. The Commission held that the physical, mental and sexual harm inflicted on the victims affected their physical and mental well-being in violation of the right to health. The Commission ordered Egypt to conduct an investigation into the violation and to pay adequate compensation to each of the victims.<sup>96</sup>

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<sup>93</sup> Art 6(c).

<sup>94</sup> Mashood Baderin, ‘Modern Muslim States between Islamic Law and International Human Rights Law’ (PhD thesis, University of Nottingham 2001) 123.

<sup>95</sup> *Egyptian Initiative for Personal Rights and Interights v Egypt, Communication 323/06*.

<sup>96</sup> Magnus Killander and Bright Nkrumah, ‘Human Rights developments in the African Union during 2012 and 2013’ (2014) 14(1) AHRLJ 275, 281.

### **3.4 Regime for the Enforcement of Human Rights in Africa: The Commission and Court**

In order to ensure compliance and protect guaranteed rights, the African Charter established the African Commission which was to play both promotional and protective roles. However, given what was a less than satisfactory result, a court was created in 2004 to complement the Commission's work and mandate. The following sections are brief introductions to these bodies and their intended roles.

#### **3.4.1 The Commission**

Article 30 of the Charter provides for the creation of an African Commission 'to promote human and peoples' rights and ensure their protection in Africa'. Chapter II of the Charter further classifies the mandate of the Commission into four categories:

- Promotion of human and peoples' rights,
- Protection of human and peoples' rights,
- Interpretation of the provisions of the Charter,
- Performance of any other tasks entrusted to it by the Assembly of Heads of State and Government.

#### *Promotional Role*

While not strictly defining the term 'promotion', Article 45 of the Charter sets out three categories of activities that fall under it. They are:

- To collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and give views or make recommendations to governments.



- To formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations.
- Cooperate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.

Even though not directly specified in the list above, the state reporting system is one of the Commission's principal means of promoting human rights directly to the states. By Article 62, each state is to submit, once every two years, a report on legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the Charter. Through these reports, the Commission may assess the human rights situation in these states and give feedback through Concluding Observations. How member states and the Commission have performed their roles under this process will be analysed in future chapters.

#### *Protective Mandate*

On the Commission's protective role, the Charter provides that it is to ensure the protection of rights under conditions laid down in the Charter.<sup>97</sup> These conditions are basically outlined in the communications procedure through which the Commission addresses complaints of violations of rights protected under the Charter. By Article 47, a state may institute a complaint against another state where it believes that that state has violated the provisions of the Charter. By Article 50, the Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged. This provision prevents forum shopping and duplicity of actions.

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<sup>97</sup> Art 45(2).

It is interesting to note that, unlike for state communications, the Charter does not expressly provide for individual and NGO complaints. The existence of this group of complaints can only be deduced from Article 55 which provides for the Secretary of the Commission to transmit to other members a list of communications 'other than those of state parties' for the purpose of deciding which communications would be considered. Article 56 goes on to provide the criteria such communications must meet in order to be eligible for consideration. These include an indication of the authors, compatibility with the Charter, exhaustion of domestic remedies and the use of non-disparaging language.

The Charter does not expressly grant the Commission any judicial authority to make binding decisions or impose sanctions on states. Rather Article 52 provides that the Commission, in the case of state communications, shall prepare a report to the states concerned and transmit same to the Assembly of Heads of State and Government. While transmitting the report to the Assembly, the Commission may make 'such recommendations as it deems useful'.<sup>98</sup> The Commission is again required to draw the attention of the Assembly to special cases involving serious or massive violations of human rights and undertake in-depth studies of these cases accompanied by its findings and recommendations upon the request of the Assembly.

It appears from the above provisions that the Commission is effectively reduced to an administrative body issuing reports and recommendations to the Assembly which inarguably undermines its protective mandate. This is more so the case given that Article 59 further requires for all measures to be maintained in confidence until otherwise decided by the Assembly. One may argue that, for the Commission to have any meaningful protection mandate, it should have some quasi-judicial or administrative authority to enforce human rights. However, this is not the case going by the provisions of the African Charter. What this would mean for the purposes of this research is that the practice of the Commission, and even adherence to its decisions, would have to be

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<sup>98</sup> Art 53.

assessed based on these provided standards. This, of course, would not preclude criticism of the standard as it would be argued that this is one instance where the internal standards themselves, as opposed to the practice, do not measure up to general expectations. In this way, the approach of the research is distinct from the prevalent approach in other literature which largely criticise the workings and effectiveness of the Commission without paying due attention to the internal standards on which such effectiveness should be assessed. In such instances, the institution, and not the set standard is erroneously blamed for the perceived ineffectiveness. This, as will be seen from future chapters, could lead to adopting partial and less effective solutions as some of the real underlying issues would remain unresolved. One quick example here is the creation of the African Court, a step that does not appear to have sufficiently addressed the underlying challenge of lack of political will on the part of member states. The basic principles and jurisdiction of this Court are examined below.<sup>99</sup>

### **3.4.2 The African Court on Human and Peoples' Rights**

The African Court on Human and Peoples' Rights was the AU's response to complaints about the weak protective mandate of the Commission. Ironically, the decision to create a court in the future may have been taken as far back as the drafting of the African Charter which created the Commission as its enforcement body. The non-provision for a court in the African Charter may have merely represented a concession to the prevailing political climate at the time.<sup>100</sup> Even though the widely published reason may have been that the Commission standing alone reflected African traditions of conciliation rather than confrontation, the real reason may have had more to do with the widespread reluctance among member states to subordinate themselves to a supranational judicial organ.<sup>101</sup> Thus it was anticipated that muted suggestions for the creation of a court would arise again in the future.

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<sup>99</sup> See Chapters 5 and 7.

<sup>100</sup> Julia Harrington, 'The African Court on Human and Peoples' Rights' (2002) in Malcolm Evans and Rachel Murray (eds) *The African Charter on Human and People's Rights: The System in Practice, 1986–2000* (CUP 2002) 306.

<sup>101</sup> Gino Naldi ( n 41) 12.

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) came into force in 2004, and the Court was officially installed in 2006. The function of the Court as stated in the Protocol was to complement the protective mandate of the African Commission.<sup>102</sup> By Article 5 of the Protocol, the following may submit cases to the Court: the Commission, state party, state party whose citizen is a victim of human rights violation, and African intergovernmental organisations. Thus, unlike is the case with the Commission, individuals and NGOs cannot institute cases in the Court as of right. However, the Court may entitle relevant NGOs with observer status before the Commission and individuals, to institute cases directly before it only if, at the time of the ratification of the Protocol or any time thereafter, the state concerned has made a declaration accepting the competence of the Court to receive such cases.<sup>103</sup> As of 2016, only eight States have made this declaration with Rwanda's withdrawal bringing the number down to seven.<sup>104</sup>

#### *Impact of the Court's Binding Power*

Article 27 of the Court's Protocol authorises the Court to make appropriate orders to remedy violations of human and peoples' rights, including the payment of fair compensation or reparation. Article 30 mandates state parties to the Protocol to undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.

Despite this new laudable dimension to the African human rights system in the form of the African Court, it is still evident that states play a huge role in making the system work by complying with judgments against them. The change that the Court brings is the finality of its judgments, and their binding force on states unlike recommendations of

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<sup>102</sup> African Court Protocol, art 2.

<sup>103</sup> Arts 5(3) & 34(6).

<sup>104</sup> See Section 5.5.2.

the Commission.<sup>105</sup> The Court's Protocol also provides for the transmission of the Court's judgments to other member states of the AU as well as the Council of Ministers which is to monitor their execution on behalf of the Assembly.<sup>106</sup> It further provides for the Court to submit its reports to the Assembly, specifying cases in which a state has failed to comply with the Court's judgment.<sup>107</sup>

In 2005, the AU decided to merge the African Court with the African Court of Justice created by the Constitutive Act of the AU. The two courts would form the African Court of Justice and Human Rights. This merger which proposed the creation of two chambers—the Human Rights Section and the General Affairs Section, does not affect the modalities and powers of the Court already described above.<sup>108</sup>

### **3.5 Conclusion**

The African human rights system has created a comprehensive network of human and peoples' rights captured in the African Charter, the Court's Protocol and the Women's Protocol. The African system has taken advantage of its comparative recent existence to draw from the experiences and conceptions of other climes thus creating a hybrid system of rights that has at its core, the spirit, and flair of Africa. This is clearly demonstrated in the protection, both in Charter provisions and by the decisions of the Commission, of socio-economic and cultural rights as well as peoples' rights. The Charter's clear attempt to enthrone the enforceability of socio-economic rights is reflective of the situation in the region and the need to build a society of general well-being. Its provisions and positive decisions of the Commission in defence of peoples' rights demonstrate the true 'Africanness' of the Charter and underlie the need to protect the diverse identities and cultures of many minorities and oppressed groups on

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<sup>105</sup> See Chapter 5 for analyses.

<sup>106</sup> Art 29.

<sup>107</sup> Art 31.

<sup>108</sup> See Section 7.3.2.

the continent. Unlike other systems, such as the European Convention on Human Rights, there is no distinction or classification of these rights as socio-economic rights have been ascribed justiciability just as the other rights. This latter characteristic increases the burden of implementation on member states and future chapters will examine just how much member states have implemented and enforced these rights.

Additionally, there is the concept of peoples' rights which makes the collective the holder of the right as opposed to the individual. This further shows the distinctiveness of the African Charter as opposed to, say, the European Convention, which places the individual at the centre of its declarations. The uniqueness of the Charter is also evident in its approach to duties owed both by the states and by individuals. This further reflects the Charter's communitarian and collective stance.

The additional Protocol on women's rights is a step taken to protect this marginalised group whose history has been tainted with abuses and exploitations. Thus, far from being an unnecessary duplication of rights already contained in the Charter, this Protocol addresses, and buttresses very germane issues that affect women and the girl child such as sexual health and child marriages. The next chapter will further demonstrate the importance of some of these provisions.

With respect to institutional mechanisms, the African human rights system has continued to evolve with the creation of a court. Further efforts have even been made towards modifying the regional judicial system into a tripartite court with a criminal arm. Following the methodology adopted in the research, the practice of these institutions, vis-à-vis their stated roles, will be addressed in subsequent chapters.

In summary, the chapter has shown the presence of a unique and dynamic normative human rights framework in Africa—one that involves a blend of negative rights, group rights, socio-economic rights, duties, and responsibilities. It has also shown the establishment of institutional capacities—the Commission and the Court. This

exposition and analysis satisfy the 'ought' phase of immanent critique. It remains to be seen how the member states and regional mechanisms have implemented these standards and whether they have fallen short of expectations as set by these regional instruments. Proceeding from this stage, therefore, the next phase of the research will investigate the realities of the system in practice. Thus, having established what rights are to be protected, the next step is to examine whether these rights are protected in practice as they should be. This task is undertaken in the next chapter.

## CHAPTER 4

### 4 The Charter in Practice: Analysis of States' Implementation and Compliance with Human Rights and Responsibilities

#### 4.1 Introduction

The existence of constitutional provisions for specific civil and political rights is a necessary but insufficient condition for the legal protection of these rights... the question should always be whether the government is open and legally accountable to its citizens.<sup>1</sup>

Today, it is generally agreed that there is no shortage of human rights norms. The most pressing problem is the implementation of these norms at the 'grass roots' and making them meaningful in people's lives.<sup>2</sup>

With the provisions and standards of the Charter having been examined in the previous chapter, this chapter moves on to the next stage of immanent critique which is an analysis of states' implementation and compliance with these standards. Thus, do African states live up to the norms prescribed by the Charter? Also, do the institutions charged with the promotion and protection of these rights carry out their functions as stipulated by the Charter? In simpler terms, while the previous chapter examined the 'ought' (that is, the situation envisaged by the Charter) this chapter will examine the 'is' (that is, what is the reality on the ground? What is the system in practice?). As stated above, the two key players here are the member states and the regional institutions (Court and Commission). This chapter will focus on the former by examining how member states have lived up to their Charter responsibilities. Analysis of the institutions will be undertaken in the next chapter.

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<sup>1</sup> Abdullahi An-Na'im, *Human Rights under African Constitutions* (UPP 2003)18.

<sup>2</sup>George Mugwanya, 'Realising International Human Rights Norms through Regional Human Rights Mechanisms: Reinvigorating the African System' (2000) 10 IICLR 35, 39.



As explained in the methodology section, this chapter will examine the following groups of reports/records for the purpose of measuring states' implementation and compliance with the Charter:

- NGO statements,
- Special Rapporteur Reports and Press Statements, and
- State Reports of member states and corresponding Concluding Observations of the Commission.

#### **4.1.1 Mode of Examination**

The contents of each of the three categories of reports will be examined individually. This is due to a number of reasons. Firstly, there is the need to highlight the exact focus of these groups of reports and the areas to which they draw attention. Also, the first two categories of reports (NGO and Special Rapporteur statements) are rather restrictive in the subjects that they cover. Thus, while they would enrich, say, general discussions on civil and political rights, their lack of focus on areas of socio-economic and peoples' rights is noticeable. Thirdly, and perhaps most importantly, while the subject matter of the first two categories stretches across over 20 different African countries, analyses of the third are limited to five specially selected countries. There is, therefore, the need to distinguish the various categories to allow the reader appreciate the content and substance of each group.

Given that they address compliance with most of the rights explained in the previous chapter (that is, including socio-economic and peoples' rights), the examination of State Reports and Concluding Observations is given paramount attention for the purpose of determining the general level of compliance with the Charter. However, NGO and Special Rapporteur reports are important for drawing attention to some of the most problematic and challenging areas of implementation relating mostly to negative civil and political rights. For each of these reports, the addressed countries are identified. Efforts have been made to cover reports for a host of other countries aside the five countries selected for analysis of State Reports and Concluding Observations.

## 4.2 An Introduction to the State of Human Rights in Africa

*'The African continent continues to be the scene of several human and material disasters resulting from armed conflicts and bad governance, and all of this is exacerbated by the increasing state of poverty the vast majority of our people in rural areas already live in.'*<sup>3</sup>

Often perceived as the Dark Continent, Africa's recent history is replete with tales of civil wars, armed conflicts, famine and human atrocities. These recurrent crises have often been the basis of gross human rights violations and flagrant disregard for the worth or life of the individual. The subject of human rights and the need to protect them have therefore been accorded utmost priority and focus by the international community in its dealings with Africa. Part of the efforts have been to get African states to adopt democratic systems of government believed to create human rights friendly societies as opposed to sit-tight dictatorships characterised by high-handedness and abuse of power. Efforts to imbibe a human rights culture in the African continent was not left to foreign initiatives alone. African leaders themselves were in the mid-1970s beginning, even though in small numbers, to discuss ideas of developing human rights standards across the continent. In 1975, some African leaders refused to attend OAU summits owing to the OAU's failure to sanction the Ugandan leader Idi Amin for what they viewed as gross human rights violations.<sup>4</sup> Also, African jurists and experts organised conferences and consultations wherein they debated the creation of an African Commission on Human Rights. These efforts and clamours finally reaped rewards when, in 1979, the Assembly of Heads of States and Governments requested the Secretary-General of the OAU to organise a restricted meeting of highly qualified experts to prepare a preliminary draft of an African Charter on Human and Peoples' Rights providing for the establishment of organs to promote and protect human and peoples'

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<sup>3</sup> Statement by Commissioner Reine Alapini-Gansou, Chairperson of the ACHPR, on the Occasion of the Commemoration of Africa Human Rights Day' (2010) <http://www.achpr.org/press/2010/10/d8/> accessed 19 November 2015.

<sup>4</sup> George Roberts, 'The Uganda-Tanzania War, the fall of Idi Amin, and the failure of African diplomacy, 1978-1979' (2014) 8(4) JEAS 692.

rights.<sup>5</sup> A draft charter was prepared and considered by a meeting of government experts before being adopted and signed in June 1981 during an OAU Summit in Nairobi, Kenya. The basic contents and standards of this Charter have been analysed in the previous chapter. The logical progression is to evaluate just how much the situation has changed since the adoption of the Charter and whether states have modelled political systems and practices according to the standards of the Charter.

### **4.3 Analysis of NGO Statements**

As explained in the methodology section, the Commission works closely with a number of NGOs to whom it grants observer statuses. This status entitles the NGOs to participate in periodic sessions and issue statements and reports. In September 2015, the Commission's website displayed about 19 NGO statements issued on the human rights situation in 11 countries and covering the periods between 2008-2015.<sup>6</sup> These NGO statements cover five broad areas namely harassment of human rights defenders (HRDs), restriction of NGOs, the state of socio-economic rights, restrictions on freedom of expression (including press/media freedom) and restrictions on freedom of association and assembly. Following from the analysis of the previous chapter, these would engage the following rights: right to life; freedom from torture, inhuman and degrading treatment; right to personal liberty; right to fair trial; right to receive information and freedom of expression; freedom of assembly; right to health, and protection of vulnerable groups.

An examination of the contents of these NGO reports will, therefore, give an insight into the practice and observance of negative civil and political rights by African states, as well as a glimpse into the state of positive socio-economic rights in some communities. A closer examination of these reports, under the relevant headings, is undertaken below.

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<sup>5</sup> Obinna Okere, 'The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems' (1984) 2 HRQ 141, 144.

<sup>6</sup> The countries are Eritrea, Somalia, Ethiopia, Malawi, Swaziland, Algeria, Swaziland, Angola, Uganda, Zimbabwe and Democratic Republic of Congo.

#### **4.3.1 Harassment of HRDs**

The harassment and ill-treatment of HRDs dominate most of the NGO statements. These statements set out challenges faced by HRDs in mostly North and Southern African countries such as Algeria, Egypt, and Malawi. Some of these are reviewed below.

##### *Algeria*

This report mainly covers violations of the rights to liberty and assembly of HRDs. At the Commission's 51<sup>st</sup> Session, the Cairo Institute for Human Rights Studies (CIHRS) called the Commission's attention to the 'worrying situation' of HRDs in Algeria. It stated that HRDs continually suffered police and judicial harassment in the form of arrests, interrogations, and malicious prosecutions. For instance, in November 2011, the police arrested a member of the Algerian League for the Defence of Human Rights after she had announced a hunger strike and sit-in protesting human rights violations in Algeria. Also, in 2012, two members of the National Committee for the Defence of the Rights of the Unemployed were convicted for participating in 'unauthorised' demonstrations and sentenced to one year in prison.<sup>7</sup> Other similar arrests had been subsequently made.<sup>8</sup>

##### *Egypt*

As with Algeria above, this report highlights the deprivation of the right to liberty of HRDs through arbitrary arrests. CIHRS pointed out that there has been a crackdown on independent civil societies and HRDs. For instance, within just a few months, over 17 NGO offices had been raided by security forces. There was also a government-led smear campaign aimed at defaming these groups before the Egyptian public as foreign agents whose objective was to cause public instability and division within Egypt.<sup>9</sup>

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<sup>7</sup> This sentence was overturned on appeal.

<sup>8</sup> Address of the Cairo Institute for Human Rights Study at the 51<sup>st</sup> Ordinary Session of the African Commission on Human and Peoples' Rights 2012' (2012) <http://www.achpr.org/sessions/51st/ngo-statements/11/> accessed 9 September 2015.

<sup>9</sup> Ibid.

*Democratic Republic of Congo, Malawi, Senegal, Swaziland, Uganda and Zimbabwe*

At the Commission's 51<sup>st</sup> Session the International Commission of Jurists reported that HRDs in the mentioned countries had suffered the following human rights violations:

- Harassment by government authorities and/or security forces
- Arbitrary arrests
- Cruel and degrading treatment whilst in detention
- Physical assaults
- Enactment and use of repressive laws,
- Torching of homes
- Death threats
- Extra-judicial executions.<sup>10</sup>

These persistent violations, the body noted, often arose in the context of elections and were perpetrated by state actors who were hardly ever held to account.<sup>11</sup>

#### **4.3.2 Restrictions on NGOs**

Closely related to the harsh treatment of HRDs are the restrictions on the operation of NGOs. The reports note that certain states have adopted laws and policies that limit or frustrate the operation of human rights NGOs. Such restrictions, it was noted, generally infringed on the freedom of conscience and association. Two states identified with such infringements were Algeria and Ethiopia.

##### *Algeria*

CIHRS pointed out that the new Algerian law No 12-06 of January 2012 increased governmental restrictions on human rights NGOs. For instance, Article 39 gave the

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<sup>10</sup> ICJ Oral Intervention on the Human Rights Violations Affecting Human Rights Defenders (HRDs) in Africa <http://www.achpr.org/sessions/51st/ngo-statements/14/>, accessed 14 October 2015.

<sup>11</sup> Ibid.

government broad discretion to refuse to register associations <sup>12</sup> and failed to provide these associations with an adequate remedy to appeal a rejection of their registration request. The new law also tightened governmental control over funding by providing a short list of authorised national funding sources with international funding requiring prior authorisation and forbidden to Algerian associations without officially established relationships of cooperation with the Ministry of Interior.<sup>13</sup> Due to difficulties occasioned by the new law, some organisations were forced to close down.<sup>14</sup>

### *Ethiopia*

At the Commission's 51<sup>st</sup> Ordinary Session, Amnesty International called attention to Ethiopia's Charities and Societies Proclamation of 2009 which placed 'excessive restrictions' on the work of human rights organisations. Top of these was the restriction on such organisations from receiving more than 10% of their funding from foreign sources which resulted in at least 17 organisations changing their mandate from human rights. In a retroactive application of the law, two organisations had their assets frozen, amounting to over \$500,000 each.<sup>15</sup>

The report pointed out the excessive powers of interference and surveillance granted to the Charities and Societies Agencies such as the power to suspend licences<sup>16</sup> and confiscate and transfer the assets of any organisation.<sup>17</sup> Also, the Agency had the power to demand any document in an organisation's possession<sup>18</sup> invariably including the testimonies of victims of violations thereby contravening principles of confidentiality

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<sup>12</sup> Under this article, the government can refuse to register an association whose purpose or goals are deemed contrary to basic national values and to law and order, public morality and the provisions of existing laws and regulations.

<sup>13</sup> African Commission (n 8).

<sup>14</sup> The International Centre for Not-For-Profit Law, 'NGO Law Monitor: Algeria' <http://www.icnl.org/research/monitor/algeria.html> accessed 10 September, 2015.

<sup>15</sup> Amnesty International, 'Oral Statement at the 51<sup>st</sup> Ordinary Session of the Commission' <https://www.amnesty.org/download/Documents/16000/afr250032012en.pdf> accessed 10 September 2015.

<sup>16</sup> Art 92.

<sup>17</sup> Art 94.

<sup>18</sup> Art 85.

and further endangering the victims. Furthermore, the report alleged that some organisations were forced to remove certain areas of work from their mandates such as election monitoring and even change their names before they could be registered under the new law.<sup>19</sup> Amnesty International claimed that the intended effect of this law was to restrict and effectively stifle critical voices as well as limit the level of scrutiny of the government thereby limiting civil and political rights such as freedom of association, freedom of speech and the right to participate in government.

#### **4.3.3 Freedom of Expression – Press and Media Rights (Article 9)**

This set of reports addresses the freedom of expression from the perspective of restriction of the press and news media.

##### *Eritrea, Ethiopia, Somalia and Uganda*

The East and Horn of Africa Human Rights Defenders Network (EHARD-Net) drew attention to the political oppression of press and media people on the continent. In Somalia, five journalists were victims of targeted assassinations within five months while ‘numerous’ journalists had been injured or beaten by police while covering the opposition demonstrations. In Ethiopia, journalists were put on trial for ‘supporting’ terrorist groups. One such accused had written an article online shortly before his arrest criticising the government’s use of the anti-terrorism law to suppress dissent. The report stated that up to 32 journalists were in detention in Eritrea with one of them needing serious medical attention and not allowed access to visitors.<sup>20</sup>

##### *Swaziland, Uganda, and Zimbabwe*

The Eastern Africa Journalists Association (EAJA) and International Trade Union Conference-Africa Regional Organisation (ITUC-Africa) reported violations of press

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<sup>19</sup> Amnesty International (n 15).

<sup>20</sup> Oral Intervention on the report of Special Rapporteur on Freedom of Expression and Access to Information’ <<http://www.achpr.org/sessions/51st/ngo-statements/15/>> accessed 11 September 2015.

freedom in the mentioned countries. These were mostly in the form of ‘obnoxious, vague and sometimes secretive’ terrorist, security and criminal laws, which were employed to persecute media practitioners and citizens.<sup>21</sup> For instance, the Lawyers for Human Rights reported that while Swaziland’s 2005 Constitution contained the full list of the Bill of Rights including freedom of association, assembly, expression and the right to information, it took away most of these rights through ‘excessive’ clawback clauses. One of the effects of these clawback clauses was that political parties were banned and had no right to participate in elections. Also, HRDs and activists had no access to state-owned print and electronic media houses.<sup>22</sup>

#### **4.3.4 Freedom of Association and Assembly (Articles 10 & 11)**

These are the next sets of rights addressed by NGO statements and cover nearly a dozen countries. It should be recalled from Chapter 3 that the Commission, in 1992, adopted a resolution further expatiating on this right. The NGO statements are addressed below.

*Nigeria, Ghana, Botswana, Guinea, Ethiopia, Zimbabwe, Mali, Guinea-Bissau, Swaziland, Benin, Tunisia*

EAJA and ITUC-Africa reported that there was systemic state abuse, denial and erosion of workers’ right to freely, independently and democratically join and form trade unions of their choice—these infractions took place despite constitutional and legal mechanisms provisions at the national, continental and international arenas.<sup>23</sup> Where state parties were not outrightly refusing to allow workers to organise, they were making attempts to amend certain aspects of national legislation to deny the exercise

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<sup>21</sup> Statement by Eastern Africa Journalists Association (EAJA) in conjunction with International Trade Union Conference-Africa Regional Organisation (ITUC-Africa) <http://www.achpr.org/sessions/51st/ngo-statements/25/> accessed 11 September 2015.

<sup>22</sup> Presentation by the Lawyers for Human Rights at the 51<sup>st</sup> Session of the African Commission <<http://www.achpr.org/sessions/51st/ngo-statements/24/>> accessed 11 September 2015.

<sup>23</sup> Statement by Eastern Africa Journalists Association (EAJA) in conjunction with International Trade Union Conference-Africa Regional Organisation (ITUC-Africa), ‘State of human rights situations in Africa-Africa Trade Union Movement perspectives’ (2012) <http://www.achpr.org/sessions/51st/ngo-statements/25/> accessed 27 July 2016.



of those rights. The report points to the Nigerian example where workers were denied the right to organise and when they had moved to assert this right by forming trade unions, the Nigerian government (their employer) refused to recognise them. More recently, in 2014, the Nigerian government sacked nearly 16,000 striking doctors;<sup>24</sup> a similar approach had been adopted the previous year for striking university lecturers.<sup>25</sup>

The report also pointed to cases of ‘direct and forceful attempts’ by governments to seize and control trade union organisations including cases where NGOs were indirectly shut out of existence through legislative restrictions on funding. A most disturbing example of the attempt to silence trade unions was that played out in Swaziland where a recently merged trade union, Trade Union Congress of Swaziland, was deregistered by the country’s Labour Commissioner on the advice of the Attorney-General. The interpretation of the Industrial Labour Act by the Attorney-General also led to de-registration of the Swaziland Employers’ Federation. Several trade union leaders were later arrested, detained and given movement restrictions.<sup>26</sup> In a similar vein, the government of Botswana, in 2011, sacked over 2000 public service workers who took part in a strike action. In 2012, teachers in Benin Republic went on strike after negotiations with the government for better working conditions collapsed. In response, the state declared the strike illegal, threatened the workers and declared their jobs vacant. The government even enlisted military personnel to take up the responsibilities classroom teachers. This sort of action, it was argued, encroached on the right to assemble and protest.<sup>27</sup>

#### **4.3.5 Socio-economic and Peoples’ Rights**

While the NGO statements generally do not cover a lot of ground here, there was one report on the lack of implementation of these rights in Angola.

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<sup>24</sup> ‘FG sacks 16,000 Resident Doctors’ Punch Newspaper (Nigeria, 15 August 2014) <<http://www.punchng.com/news/fg-sacks-16000-resident-doctors>> accessed 13 November 2014.

<sup>25</sup> Ibid.

<sup>26</sup> See n 21.

<sup>27</sup> Ibid.

## *Angola*

In its statement, the International Work Group for Indigenous Affairs (IWGIA) expressed concern on the socio-economic situation of a number of the San Communities in Huila, Kunene and Kuando Kubango provinces of Angola. From contact with the San Communities in Huila between 1998 and 2011, IWGIA identified cases of 'serious privations', high mortality rates and social fragmentation during the 27 years of civil war as well as open exploitation and discrimination by Bantu groups who had more socio-economic and political power.

A needs assessment commissioned in 2003 identified the San as a small, vulnerable ethnic minority group, living in extreme poverty often in areas riddled with landmines. The assessment also identified 'very high' illiteracy and mortality rates, lack of infrastructure and access to health care facilities. A summary of the problems faced by these communities included:

- Lack of access to basic services such as education, health because of remoteness and exclusion/discrimination leading to high level of illiteracy, disease, death of pregnant women / children, etc.
- Lack of access to water
- Insecurity due to violent conflicts or harmful practices
- Land rights and natural resources: lack of access to land, problematic of evictions of indigenous populations for different reasons such as conservancy, development projects, mining. etc.
- High level of poverty, no access to employment
- Poor representation in decision-making institutions such as local authorities, national government.<sup>28</sup>

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<sup>28</sup> IWGIA Statement at the 51<sup>st</sup> Session of the African Commission, <<http://www.achpr.org/sessions/51st/ngo-statements/19/>> accessed 10 September 2015.

The above deprivations engage socio-economic and peoples' rights such as the right to health, right to work, right to education, right to economic, social and cultural development, right to free disposal of wealth and natural resources, and right to a general satisfactory environment all of which have been briefly examined in Chapter 3.

#### **4.3.6 Conclusions on the Contents of NGO Statements**

NGO statements focus mainly on civil and political rights especially the freedom of expression, freedom of assembly and association and the treatment of HRDs and NGOs. This comes as no surprise given that human rights NGOs in fledgeling democracies (and, as is the case in some African states, military governments/dictatorships) tend to focus more on basic civil and political rights. The cases of violations recorded show a degree of high-handedness and undemocratic tendencies on the part of the identified states. The harassment of HRDs also signals a low commitment to the ideals of the Charter.

While the NGO statements are by no means comprehensive they call attention to the challenges facing NGOs and HRDs in many African states that tend to be intolerant towards any form of opposition or dissent. These reports also paint a picture of the general disposition of some African states towards the observance of basic democratic and human rights values.

#### **4.4 Press Releases and Reports of Special Rapporteurs**

Special Rapporteurs are assigned specialised areas of human rights to monitor and track. There are currently Special Rapporteurs on rights of women, HRDs, prisons and conditions of detention, freedom of expression and access to information; and refugees, asylum seekers, migrants and internally displaced persons. As Special Rapporteurs are created to oversee challenging areas of human rights, their existence in these areas is already a strong pointer to the challenges faced.

Given their specialisations, the reports of these Special Rapporteurs are expected to be more authoritative and show in-depth analyses of the assigned areas of human rights. The following sections will study reports and press releases from 2007 to 2015 to show the practice in the aforementioned areas of human rights as covered in these reports.

#### **4.4.1 Treatment of Refugees, Asylum Seekers, Internally Displaced Persons, and Migrants in Africa**

In a 2009 press release, the Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons, and Migrants in Africa expressed concerns on the decision of the Republic of Sudan to expel international and national humanitarian organisations and their personnel from Darfur, in the wake of the ICC indictment of President Omar El Bashir. This, the rapporteur stated, would deprive about two million internally displaced persons in Darfur of the protection and assistance they had been receiving following their forced displacements. The Special Rapporteur opined that the expulsion of the humanitarian agencies and their personnel was likely to cause more suffering to the internally displaced persons in Darfur.<sup>29</sup>

More recently, in 2015, the Special Rapporteur described the situation of refugees as ‘increasingly worse and dramatic’. She revealed that the number of refugees had increased to 3.7 million owing to several sustained conflicts across the continent especially in the Central African Republic, South Sudan, Somalia, Nigeria, and the Democratic Republic of Congo. The statement pointed out that Africa accounted for ‘several’ cases of refugees spending more than five years in exile. These refugees, it is reported, faced several challenges such as lack of security, health, food and education. They were also limited in their actions by their refugee status. The statement, however,

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<sup>29</sup> Press Release by the Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons, and Migrants in Africa (2009) <<http://www.achpr.org/press/2009/03/d26/>> accessed 18 September, 2015.

commended the President of Tanzania for authorising the relevant authorities to issue naturalisation certificates to over 162,000 former Burundian refugees.<sup>30</sup>

#### **4.4.2 Human Rights Defenders**

The state and condition of HRDS is a very important issue for the Commission and a recurring theme in its reports. Thus, in 2004, the Commission adopted a resolution establishing the Special Rapporteur on Human Rights Defenders to report on and monitor the condition of Human Rights Defenders in Africa. This special mechanism has been effective in bringing attention to human rights infringements and other challenges faced by various human rights advocates on the continent. For instance, in 2007, the Special Rapporteur, Reine Alapini-Gansou, called attention to the assassination of Serge Maheshe, a journalist and HRD in the Democratic Republic of Congo (DRC).<sup>31</sup> The assassination came two years after a similar assassination of another HRD, Pascal Kimbembé, Secretary General of the organisation 'Heirs of Justice'. With the perpetrators of these acts unknown, the Special Rapporteur expressed concerns for the security of HRDs in the DRC and called the country's attention to its obligations under Articles 1, 4, and 9 of the Charter. These articles pertain to member states' general duty to recognise the rights in the Charter, right to life, and right to receive information and freedom of expression.

In another 2007 Press Release, the Special Rapporteur expressed concerns about acts of violence against HRDs in Zimbabwe. She particularly raised concern on the plight of women HRDs particularly members of Women of Zimbabwe Arise (WOZA), who faced repeated violence and harassments. She stated that on one of WOZA's peaceful marches, riot police clamped down on the protesters and violently dispersed them. A number of the women were allegedly beaten and arrested and subsequently arraigned

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<sup>30</sup> Statement by the Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa on the occasion of World Refugee Day 2015 (2015) <<http://www.achpr.org/news/2015/06/d187/>> accessed 18 September 2015.

<sup>31</sup> Special Rapporteur of the African Commission on Human and Peoples' Rights on Human Rights Defenders in Africa, 'Press Release: Assassination of the journalist and human rights defender Serge Maheshe' (2007) <http://www.achpr.org/press/2007/06/d28/> accessed 12 October 2015.

in court on charges of gathering with intent to promote public violence and breaches of the peace. Also, a lawyer and member of the Lawyers of Zimbabwe for the Human Rights was allegedly assaulted when he went to the police station with the aim of visiting and representing the detainees. The women were subsequently released after weeks in detention.<sup>32</sup> Again, these infringements engage a host of negative civil and political rights protected by the Charter among which are the right to life; prohibition of torture and cruel, inhuman and degrading treatment; right to personal liberty and protection from arbitrary arrest; right to fair trial; freedom of expression; and freedom of assembly. Furthermore, these violations engage provisions of the Women's Protocol which protect the woman's rights to dignity, life, integrity and security of the person.

In 2015, the Special Rapporteur met with HRDs to discuss the achievements and challenges recorded in the past ten years. On the conditions of HRDs, the Special Rapporteur stated:

As they continue to function in volatile environments their operations and officers continue to suffer from harassments, premises clamped down and face arbitrary arrests and detentions, while allegations of forced disappearances, summary, and extrajudicial executions remain reported in great numbers.<sup>33</sup>

She also cited reports of violations and harassment of women HRDs including unfavourable working environments, patriarchal customs, and national laws 'which deny women HRDs the full enjoyment of their rights.'<sup>34</sup> There were also reports of sexual violence and murder of women HRDs who defend sexual orientation and 'gender identity' both of which were reportedly perceived as Eurocentric norms.<sup>35</sup>

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<sup>32</sup> Special Rapporteur of the African Commission on Human and Peoples' Rights on Human Rights Defenders in Africa, 'Press Release on the Situation in Zimbabwe' (2007) <http://www.achpr.org/press/2007/06/d29/> accessed 25 October 2015.

<sup>33</sup> Statement by the Special Rapporteur on Human Rights Defenders in Africa, Africa Day' (2015) <<http://www.achpr.org/news/2015/05/d183>> accessed 9 September 2015.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

#### 4.4.3 Freedom of Expression – Clampdown on Media and Civil Protests (Article 9)

There is no doubt a close correlation between the harassment of HRDs and infringement on the freedom of expression as the former is often instigated by the need to restrict the latter. By implication, a record of clampdowns on HRDs results in a negative record of compliance with freedom of expression requirements. The existence of two special rapporteurs to monitor the situations of HRDs on the one hand and violations of freedom of expression on the other is a pointer to serious intolerance to dissent in many African states. This section will examine three Press Releases in 2011, 2013, and 2015 that generally address the observance and breach of the freedom of expression.

##### *On the Situation in North Africa (2011)*

In a 2011 Press Statement,<sup>36</sup> the African Commission, through its special rapporteur, expressed concerns over the ‘serious and massive violations taking place in the Great Socialist Peoples’ Libyan Arab Jamahiriya’. It is important to bear in mind that this was the period of the Arab Spring which led to a civil war in Libya culminating in the toppling and eventual killing of Libyan leader Muammar Gaddafi in October, 2011. The African Commission called on the Libyan government to immediately end the violence against civilians and take appropriate steps to ensure that the human rights of its citizens and all its inhabitants were respected. It especially highlighted the rights to freedom of expression, assembly, peaceful protest, and security of citizens as areas that required urgent attention and action. The statement also condemned the ‘violence and use of force against civilians’ in Algeria. It called on the government to act with restraint and to respect the rights and freedoms of its citizens. It also called for the cessation of all arbitrary arrests and for the government to follow through with its commitment to release all individuals unlawfully arrested during protests.<sup>37</sup>

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<sup>36</sup> African Commission, ‘Press Statement on the Human Rights Situation in North Africa’ (2011) <http://www.achpr.org/press/2011/02/d9> accessed 15 September 2015.

<sup>37</sup> Ibid.

The press release finally touched on Tunisia and Egypt, two states still recovering from civil unrests and regime changes. It stressed on the need to build institutions that would promote and protect human rights in these countries, and the need to respect human rights and civil liberties during the periods of transition.

*On Kenya's NGO and Media Bills (2013)*

In a 2013 Press Release<sup>38</sup> the Commission, through its special rapporteur, commended the Kenyan government for drafting an NGO bill tabled before parliament in October 2013, and adopting another media bill both of which bore testimony to Kenya's 'commitment to promote and protect the right to freedom of association and the right to freedom of expression and access to information in Kenya.' It, however, raised concerns on some of the provisions of the bills which it stated were not in conformity with the African Charter on freedom of association and expression. Some of the concerns raised were as follows:

- The provisions on the registration of associations and NGOs, and the fact that the competent authorities would have discretion which may result in the abuse of power when implementing the law
- The provision for 15% budget limit for foreign funding which was likely to restrict the activities of organisations and make it difficult for them to carry out their mandate.
- Provisions of the media bill which may restrict the right to freedom of expression and expose journalists to legal penalties.
- Various restrictions contained in the NGO and media bills which may restrict the work of organisations and journalists in Kenya.

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<sup>38</sup> African Commission, 'Press Release on the NGO and Media Bills in Kenya' (2014) <http://www.achpr.org/press/2014/04/d198/> accessed 25 October 2015.



The Commission urged Kenyan authorities to reject the bills and adopt laws that were in accordance with the regional and international human rights instruments ratified by Kenya. In a positive reaction, following street protests and other international criticisms, Kenyan lawmakers rejected the NGO bill by 83 to 73 votes, with eight MPs abstaining.<sup>39</sup>

*On the Situation of HRDs and Freedom of Expression and Assembly in Burundi (2015)*

This was a joint press release by the Special Rapporteurs on HRDs and on Freedom of Expression and Access to Information. Here the Special Rapporteurs expressed their concerns about the ‘deteriorating human rights situation’ and escalation of violence in Burundi since the announcement of the candidacy of President Pierre Nkurunziza for the then upcoming presidential elections.<sup>40</sup> They made references to reports of harassments of journalists and news outlets in Burundi including allegations of the suspension of the transmission of at least three radio stations and mobile access to social media by telecommunications companies. They called on the government to collaborate with all civil society stakeholders towards ensuring respect for human rights throughout the country.

#### **4.4.4 Prisons and Conditions of Detention (Including the Right to Fair Trial)**

The office of the Special Rapporteur on Prisons and Conditions of Detention was created in 1996 making it one of the oldest special mechanisms of the Commission. The Special Rapporteur is empowered to examine the situation of persons deprived of their liberty within the territories of state parties to the African Charter.<sup>41</sup> In a 2015 Joint Press

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<sup>39</sup> Agence France-Presse, ‘Kenya Parliament block controversial NGO Bill’ (2013) <http://www.capitalfm.co.ke/news/2013/12/kenya-parliament-blocks-controversial-ngo-bill/>.

<sup>40</sup> Joint press release by the Special Rapporteur on Human Rights Defenders in Africa and the Special Rapporteur on Freedom of Expression and Access to Information regarding the situation of human rights defenders and freedom of expression and assembly in Burundi’ (2015) <http://www.achpr.org/press/2015/05/d257> accessed 14 October 2015.

<sup>41</sup> African Commission, ‘The Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa’ <http://www.achpr.org/mechanisms/prisons-and-conditions-of-detention> accessed 26 September 2015.

Release with the Special Rapporteur on HRDs, the Special Rapporteur on Prisons and Conditions of Detention drew attention to the situation in the Democratic Republic of Congo where a number of arrests and detentions had been made following protests against the amendment of the 2005 Electoral Law. He raised particular concerns on ‘alleged irregularities’ over the arrest and detention of one Christopher Ngoyi Mutamba, an HRD, arrested in January 2015, and called on the Congolese government to ensure a fair trial as well as conduct an inquiry to establish responsibilities with regard to allegations of irregularities during his arrest and detention.<sup>42</sup>

#### **4.4.5 Conclusions on the Contents of Special Rapporteur Reports**

As previously pointed out, Special Rapporteurs oversee specialised areas of human rights and as such can only offer an overview of those areas. However, their appointments are a strong pointer to the areas of human rights which the Commission views as problematic and needing extra attention. These areas are the treatment/harassment of HRDs, freedom of expression, women’s rights, rights of prisoners and refugee rights. As in the NGO statements, there appears to be a strong focus on the harassment of HRDs and restrictions on freedom of expression and assembly. An examination of some of the affected countries show that these violations mostly occur in volatile areas experiencing electoral or armed conflicts; and often, the casualties are huge—from assassinated HRDs in the DRC to murdered protesters in Egypt and Libya.

Another shared theme with NGO statements is the suppression of NGOs and the media through restrictive legislations and policies. The example of Kenya shows that this is a tool that could be used by the more politically stable countries even though, as noted, this particular drive was unsuccessful.

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<sup>42</sup> African Commission, ‘Joint Press Release by the Special Rapporteur on Human Rights Defenders and the Special Rapporteur on Prisons and Conditions of Detention in Africa on the Human Rights Situation Following the Events Surrounding the Amendment of the Electoral Law in the Democratic Republic of Congo’ <http://www.achpr.org/press/2015/02/d250> accessed 15 September 2015.

#### **4.5 Analysing compliance through State Reports and Concluding Observations of the Commission**

As pointed out in the methodology chapter, analysis of State Reports and Concluding Observations are crucial for a credible assessment of the African human rights system in practice. This is because they (especially the State Reports) capture an essential part that is mostly missed in other forms of assessments namely the positive data on steps and policies put in place to improve and comply with human rights obligations. While states would usually attempt to highlight their achievements in the reports, the Commission in their own feedback (Concluding Observations) would, while acknowledging whatever positive developments there are, still draw the states' attention to important violations and lapses. This process can thus be likened to a system of self-assessment and subsequent objective feedback. Also, State Reports and Concluding Observations create a more complete and holistic assessment of the human rights situation in individual countries. This they do by addressing most of the relevant areas and sections of the African Charter and its accompanying Protocols. Therefore, much unlike the previously examined sources, State Reports address the implementation of the various classes of rights: civil and political, socio-economic, peoples' and women's rights. Such comprehensive coverage allows for a better assessment and evaluation of states' compliance with the Charter. By according the necessary attention to this group of reports, this research also hopes to make an important contribution to general assessments of the human rights situation in the continent.

The system of state reporting is an important means by which the Commission monitors the human rights situation in member states. These reports and the states which have submitted them are easily accessible on the Commission's website.<sup>43</sup> However, as the records show, many states have not been punctual with submitting State Reports with

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<sup>43</sup> See [www.achpr.org](http://www.achpr.org).

some states not having submitted any since the adoption of the Charter. As of March 2016, only 9 states had submitted all their reports. Fifteen states were late by one or two reports, 23 states were late by 3 or more reports while 7 states had not submitted any reports.<sup>44</sup> This record in itself is indicative of compliance with the Charter as states are mandated to submit reports.

As already explained in the methodology chapter, this study will analyse some of the most recent State Reports and Concluding Observations of countries from five sub-regions of Africa: East (Uganda), West (Nigeria), North (Sudan), Central (Cameroon), and Southern Africa (Malawi). These examinations will be subdivided into civil/political rights, socio-economic rights, peoples' rights and women's rights. As the entire contents of these rights cannot reasonably be covered in this study, the most recurrent themes under each heading will be selected for analysis.

#### **4.5.1 Civil and Political Rights**

The following analysis will focus on the right to life, freedom from torture, and right to a fair trial. The choice of these rights is based on their relative rudimentary value as well as their greater coverage in the reports and concluding observations of the selected states.

##### *Right to Life (Article 4)*

The Commission's Concluding Observations highlight instances of extra-judicial killings, maintenance of the death penalty and cases of arbitrary arrests. It will be recalled, as regards the latter, that the Commission has held that a series of arrests and detentions could in themselves constitute a violation of the right to life even though there was no actual loss of life.<sup>45</sup> On the death penalty, the Charter does not expressly forbid its

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<sup>44</sup> African Commission, 'State Reports and Concluding Observations' <<http://www.achpr.org/states/reports-and-concluding-observations/>> accessed 11 March 2016.

<sup>45</sup> Kazeem Aminu v. Nigeria, Communications No 205/97 (2000).

practice although, as will be seen, the Commission has constantly pushed for its abolition.

In its observations on Nigeria's 4<sup>th</sup> periodic report, the Commission expressed concerns over cases of extra-judicial killings in the country.<sup>46</sup> It is expected that these concerns will increase in future observations following even more allegations of extrajudicial killings against the Nigerian government in its fight against Boko Haram.<sup>47</sup> For instance, the Associated Press reports that in June of 2013 (30 days) the Nigerian Army delivered 1795 bodies to a single mortuary in Maiduguri, the birthplace of Boko Haram.<sup>48</sup> In another report, community leaders and family members told Associated Press that soldiers raided poor homes in Potiskum, the capital of Yobe state, on November 5, 2014, and dragged away young men aged between 18 and 30. Soldiers later dumped 18 bullet-ridden bodies at the hospital mortuary, according to hospital records that identified victims including a tailor, a butcher, a student and a cattle trader. The Nigerian government routinely denied these claims as rumours spread by political opponents as Nigeria prepared for presidential elections in 2015.<sup>49</sup> The Commission, in its observations, had directed Nigeria to enact a law criminalising torture and appoint a commission to investigate and make public the findings of all extrajudicial executions and enforced disappearances. However, in its most recent observation, the Commission noted that Nigeria had not reported on any steps taken to investigate and prosecute alleged perpetrators of these violations from amongst its military personnel.<sup>50</sup> In Malawi's case, the government admitted to experiencing difficulties in curbing the

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<sup>46</sup> Federal Republic of Nigeria, *Nigeria's 5<sup>th</sup> Periodic Country Report 2011-2014 on the Implementation of the African Charter on Human and Peoples' Rights in Nigeria* (June 2014) <[http://www.achpr.org/files/sessions/56th/state-reports/5th-2011-2014/staterep5\\_nigeria\\_2013\\_eng.pdf](http://www.achpr.org/files/sessions/56th/state-reports/5th-2011-2014/staterep5_nigeria_2013_eng.pdf)> accessed 15 September, 2015.

<sup>47</sup> See Human Rights Watch, 'World Report 2014: Nigeria: Events of 2013' (2014) <<http://www.hrw.org/world-report/2014/country-chapters/nigeria>> accessed 13 November 2014.

<sup>48</sup> Michelle Faul, 'Nigeria's Military killing thousands of detainees' Associated Press (Lagos, 18 October 2013).

<sup>49</sup> Michelle Faul, 'Nigerian ambassador blasts US refusal to sell arms' Associated Press (Johannesburg, 11 November 2014).

<sup>50</sup> African Commission, 'Concluding Observations and Recommendations on the 5th Periodic Report of the Federal Republic of Nigeria on the Implementation of the African Charter on Human and Peoples' Rights (2011 – 2014)', (2016) <[http://www.achpr.org/files/sessions/57th/conc-obs/5th-2011-2014/concluding\\_observations\\_nigeria\\_5th\\_sr\\_eng.pdf](http://www.achpr.org/files/sessions/57th/conc-obs/5th-2011-2014/concluding_observations_nigeria_5th_sr_eng.pdf)> accessed 20 May 2016.

arbitrary killing of citizens, especially during protests. It cited the example of the events of July 2011, where nationwide demonstrations organised by civil society organisations resulted in the death of 20 people, 19 of whom died from gunshot wounds inflicted by the police while one person suffocated from inhaling teargas.<sup>51</sup>

On the issue of the death penalty, there is an almost general violation by all the states studied. The Commission's observations have called on Uganda, Nigeria, and Sudan to observe moratoriums on the death penalty with a view to abolishing it. In Cameroon's case, the observation noted that it maintained the death penalty despite the observation of a de facto moratorium since 1997.<sup>52</sup> The Commission's observations also highlighted cases of arbitrary arrests and detentions largely permitted by Sudan's National Security Act of 2010.<sup>53</sup>

In their reports, the states generally express disagreement with the Commission's stance on the death penalty while often retaining hope for reform. For instance, Uganda, while reiterating the constitutional provision allowing the practice, drew the attention of the Commission to a 2009 Supreme Court ruling upholding the argument that it was unreasonable to keep an inmate on death row for more than three years, after which time their sentence must be commuted to life imprisonment. It stated that as of April 2013, 224 inmates on death row had had their sentences commuted to life imprisonment.<sup>54</sup> In its response to the Commission, Nigeria simply maintained the constitutionality of the death penalty pointing out that this position had been upheld by

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<sup>51</sup> Republic of Malawi, *Report to the African Commission on Human and Peoples' Rights: Implementation of the African Charter on Human and Peoples Rights 1995-2013 and the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women 2005-2013* (2014) para 65 [http://www.achpr.org/files/sessions/56th/state-reports/1-1995-2013/malawi\\_state\\_report\\_eng.pdf](http://www.achpr.org/files/sessions/56th/state-reports/1-1995-2013/malawi_state_report_eng.pdf) accessed 15 September 2015.

<sup>52</sup> African Commission, *Concluding Observations on the 3rd Periodic Report of the Republic of Cameroon* (2014) para 51 < [http://www.achpr.org/files/sessions/54th/conc-obs/3-2008-2011/concluding\\_observations\\_cameroon\\_eng.pdf](http://www.achpr.org/files/sessions/54th/conc-obs/3-2008-2011/concluding_observations_cameroon_eng.pdf) > accessed 24 September 2015.

<sup>53</sup> The relevant provisions of this Act will be addressed in the section on right to fair trial.

<sup>54</sup> Republic of Uganda, *5<sup>th</sup> Periodic Report by the Government of the Republic of Uganda to the African Commission on Human and Peoples' Rights* (2013) 16 < [http://www.achpr.org/files/sessions/56th/state-reports/5-2010-2012/uganda\\_state\\_report\\_eng.pdf](http://www.achpr.org/files/sessions/56th/state-reports/5-2010-2012/uganda_state_report_eng.pdf) > accessed 24 October 2015.

the Nigerian Supreme Court.<sup>55</sup> Similarly, the Sudanese government, in disagreeing with the Commission, maintained that the death penalty would be applied in the case of 'very serious crimes in accordance with the law.'<sup>56</sup>

It must be stated that the Charter itself does not expressly forbid the death penalty with the only driving force being resolutions adopted both by the African Commission and the United Nations.<sup>57</sup> The Commission has however gone a step further by adopting, in 2015, a 'draft protocol to the African Charter on Human and Peoples' rights on the Abolition of the death Penalty in Africa' which was subsequently brought before the African Union.<sup>58</sup> Until this draft Protocol goes through the necessary process of adoption and ratification whereby it becomes a part of the Charter, member states may argue, not without some validity, that they are not in violation of the Charter by allowing the death penalty in their laws. In any case, it should be pointed out that more countries have either abolished or initiated a moratorium on the death penalty than not. As of 2015, 18 African states had abolished the death penalty while another 19 African states had a moratorium.<sup>59</sup>

### *Freedom from Torture, Cruel, Inhuman and Degrading Treatment (Article 5)*

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<sup>55</sup> The Report cites the 1998 case of *Kalu Onuoha v The State*.

<sup>56</sup> Republic of Sudan, The 4<sup>th</sup> and 5<sup>th</sup> Periodic Reports of the Republic of the Sudan in accordance with art 62 of the African Charter on Human and Peoples Rights 2008-2012 (2013) para 83 <[http://www.achpr.org/files/sessions/51st/state-reports/4thand5th-2008-2012/staterep4and5\\_sudan\\_2012\\_eng.pdf](http://www.achpr.org/files/sessions/51st/state-reports/4thand5th-2008-2012/staterep4and5_sudan_2012_eng.pdf)> accessed 14 October 2015.

<sup>57</sup> The African Commission adopted a resolution calling on states to observe a moratorium on the death penalty at its 44<sup>th</sup> Ordinary Session in Abuja, 2008. See Amnesty International, 'African Commission call for a moratorium on the death penalty' (2008) <<https://www.amnesty.org/en/latest/news/2008/12/african-commission-calls-moratorium-death-penalty-20081205/>> accessed 22 October 2015.

<sup>58</sup> World Coalition against the Death Penalty, 'African Commission adopts on draft Protocol on Abolition' (2015), <http://www.worldcoalition.org/Abolition-of-the-death-penalty-at-the-heart-of-African-Commission-session.html>, accessed 22 October 2015.

<sup>59</sup> Ibid. These are Angola, Burundi, Benin, Cape Verde, Cote d'Ivoire, Djibouti, Gabon, Guinea-Bissau, Mauritius, Mozambique, Namibia, Rwanda, Sao Tome and Principe, Senegal, Seychelles, South Africa and Togo. There are only 10 signatories to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, 1989. These are: Guinea-Bissau, Liberia, Togo, Benin, Gabon, Rwanda, Namibia, South Africa, Mozambique and Burundi

Another human right that features prominently in both the reports and observations is the freedom from torture, cruel, inhuman and degrading treatment. Violations of these are usually in the form of police torture of crime suspects, prison overcrowding, and harassment of detainees. For instance, the Commission called attention to the use of torture by Nigerian<sup>60</sup> and Sudanese officials, harsh prison conditions in Sudan<sup>61</sup> and prison overcrowding in Cameroun.<sup>62</sup> In Sudan's case, the Commission noted that there was no law criminalising torture in the country. Rather, Sudan's laws provided for several forms of corporal punishment such as stoning, amputation, cross-amputation, and whipping. Some of these punishments were routinely meted out, particularly against women from marginalised backgrounds, following summary trials. These forms of punishment, the Commission stated, were cruel, inhuman and degrading.<sup>63</sup> The Commission also expressed disappointment on the rise of police brutality in Uganda and urged the Ugandan government to speed up the process for the adoption of its Anti-Torture Bill.<sup>64</sup>

In their reports, the states have revealed legislative and other measures taken to tackle these practices. For instance, Uganda reported the initiation of legislative measures against torture including the passing of the Prohibition and Prevention of Torture Bill as previously recommended by the Commission.<sup>65</sup> Meanwhile, Malawi acknowledged the persisting legislative loophole whereby torture had not been criminalised such that alleged perpetrators could only be charged with offences such as assault, or causing grievous bodily harm.<sup>66</sup>

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<sup>60</sup> Republic of Nigeria (n 46).

<sup>61</sup> African Commission, Concluding Observations and Recommendations on the 4th and 5th Periodic Report of the Republic of Sudan <[http://www.achpr.org/files/sessions/12th-eo/conc-obs/4thand5th-2008-2012/concluding\\_observation\\_.pdf](http://www.achpr.org/files/sessions/12th-eo/conc-obs/4thand5th-2008-2012/concluding_observation_.pdf)> accessed 24 December 2015.

<sup>62</sup> African Commission, 'Observation on Cameroun' (n 52).

<sup>63</sup> African Commission, 'Observation on Sudan' (n 61) para 40.

<sup>64</sup> African Commission, Concluding Observations of the African Court on Human and Peoples' Rights on the 4th Periodic Report of the Republic of Uganda (2011) para 15 <[http://www.achpr.org/files/sessions/49th/conc-obs/4th-2008-2010/achpr49\\_conc\\_staterep4\\_uganda\\_2011\\_eng.pdf](http://www.achpr.org/files/sessions/49th/conc-obs/4th-2008-2010/achpr49_conc_staterep4_uganda_2011_eng.pdf)> accessed 16 November 2015 .

<sup>65</sup> Republic of Uganda (n 54) 16.

<sup>66</sup> Republic of Malawi (n 51) para 73.



With regard to administrative measures, the Nigerian government reported that its National Human Rights Commission was investigating cases of torture and that a committee had previously been established to review complaints of torture in police cells although, as the Commission subsequently noted, the said committee had not yet made any reports more than six years since its creation.<sup>67</sup> Similarly, Uganda reported the establishment of a Professional Standards Unit and a Human Rights Desk to deal with complaints from the general public regarding the conduct of members of the police force. The Uganda Prisons Service even had an Assistant Commissioner tasked specifically with handling human rights issues of prisoners. In a similar vein, Malawi reported the recent creation of an Independent Complaints Commission to investigate complaints of brutality, deaths or misconduct at the hands of the police.<sup>68</sup> There were also provisions for a Lay Visitors Scheme whereby a team of local people would inspect conditions of police stations and places of detention. Importantly, however, the government cast doubt on its ability to enforce these based on available resources and capacity. It also acknowledged the lack of adequate mechanisms for reporting incidents of alleged torture either at the hands of the police officers or prison authorities.

The significance of such concessions as the above, in the context of states' ability to protect and implement rights, will be discussed more thoroughly in Chapter 6. At this stage, it is only necessary to observe that these states often do not have the capacity to implement policies even where they exist. This is significant because it shows that failure to observe rights is not always solely attributable to dictatorial or legislative factors as the existence of laws or democratic governments may not in themselves guarantee human rights protection where the government is incapacitated through the lack of adequate finance and infrastructure.

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<sup>67</sup> African Commission, 'Observation on Nigeria' (n 50) para 67.

<sup>68</sup> This body was created under the country's Police Act, 2010.

### *Right to Fair Trial (Article 7)*

The State Reports and Concluding Observations also highlight violations of the right to fair trial especially the right to be tried within a reasonable time by an impartial court or tribunal. It must be pointed out here that, as discussed in the preceding section, failure to implement this right did not owe solely to the lack of appropriate legislations as most of the states studied had the requisite provisions for bringing suspects before the courts. Rather part of the problem lay with government's incapacity to cope with the demand for these services. For instance, Malawi noted that despite provisions to arraign suspects in court within 48 hours, this was not always feasible given the lack of courts in some localities and the poor police-citizen ratio. Also, the criminal justice system was so overwhelmed that criminal cases, especially serious ones like homicides took a long time to be decided.<sup>69</sup>

However, it was not always the case that appropriate laws were in place to safeguard these rights. One clear case of this is Sudan's National Security Act 2010 which allowed security officials to detain suspects for up to four and a half months without judicial review before charges are levied. The said Act also provided members of the National Intelligence and Security Service and their associates with immunity from criminal and civil procedures for acts connected with the official work of the member. The Commission observed that this Act had been the basis of several human rights infringements including incommunicado detentions and has called for the Sudanese government to repeal the offending articles.<sup>70</sup>

#### **4.5.2 Socio-economic Rights**

Unlike earlier sources such as NGO and rapporteur statements, State Reports and Concluding Observations provide important information on the observance of socio-economic rights. Thus, an analysis of these reports/observations is important in

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<sup>69</sup> Republic of Malawi (n 51) para 78.

<sup>70</sup> African Commission, 'Observation on Sudan' (n 61) para 66.

addressing the important immanent critique question of whether African states comply with their socio-economic responsibilities under the Charter. Like in the case of civil and political rights above, discussions on socio-economic rights will be done under the following subheadings: right to health and right to education. Other collective socio-economic rights will be discussed under 'peoples' rights'.

#### *Right to Health (Article 16)*

This area is extensively covered in all of the reports with the major cited challenges being the prevalence and high mortality rates from malaria and HIV, and the lack of access to basic health facilities. The various reports detail governments' steps in tackling these challenges and ameliorating their general negative impact. For instance, Uganda stated that the government spent about \$43 per capita on health, which was 'about the same as its low-income country peers'.<sup>71</sup> The latter part of this statement is important for future discussions on the role of finance and infrastructure in implementing these standards. Furthermore, Uganda reported that steps had also been taken to increase the number of health centres and workers through the construction of six regional health centres with fully functional mental units. According to the Uganda National Household Survey 2009/2010, government health units and traditional birth attendants were reported to be the nearest health facilities/providers to the communities<sup>72</sup>. On its part, the Sudanese government highlighted the features of the country's health insurance scheme which applied to state employees, the private sector and retirees. By this scheme, the medical and health care expenses of its beneficiaries and their families would be met.<sup>73</sup>

These steps notwithstanding, the reports acknowledge a general poor state of health especially with respect to fighting malaria which remains the leading cause of death in

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<sup>71</sup> Republic of Uganda (n 54) 9.

<sup>72</sup> *ibid* 10.

<sup>73</sup> Republic of Sudan (n 56) para 196.

the continent followed by HIV/AIDS. In Sudan alone, malaria accounted for 17.5% of deaths/morbidity in all outdoor patients according to the State Report.<sup>74</sup> The baseline of HIV prevalence in 15-24-year-old pregnant women in Malawi was as high as 24.1% in 2000 though the country reported improved figures of 12% in 2011.<sup>75</sup> Cameroon reported an uneven distribution of health personnel across the country and the unequal access to quality health care between the urban and rural areas.<sup>76</sup> In addition, the Commission noted that there was 'limited free medical coverage' for children below five years and pregnant women, and a high rate of maternal and child mortality despite government efforts.<sup>77</sup> In explaining the extent of its 'free health care', Cameroon stated that this was provided for some diseases and target persons such as malaria in children below five and expectant mothers.

The question that ordinarily arises is whether, with regard to its 'limited free medical coverage', a country like Cameroon is adequately fulfilling its duty under the Charter to protect the health of its people. It would be recalled that Article 16 of the Charter entitles every individual, and not just a few, to the best attainable state of physical and mental health. However, as already highlighted in Chapter 3, the Commission has interpreted this provision to mean that states must take 'concrete and targeted steps' while taking full advantage of their available resources, to ensure the full realisation of this right.<sup>78</sup> Given this interpretation, it may reasonably be argued that Cameroon's limited provision for malaria in expectant mothers and children below five years would amount to 'concrete and targeted steps'. This may also satisfy the requirement for the state to take full advantage of its available resources were it shown, for instance, that the country could not afford to extend such services to other affected age grades and groups. However, the challenging bit is in the last part of the Commission's

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<sup>74</sup> *ibid* para 201.

<sup>75</sup> Republic of Malawi (n 51) para 105.

<sup>76</sup> Republic of Cameroon, 3<sup>rd</sup> Periodic Report of Cameroon within the Framework of the African Charter on Human and Peoples' Rights (2013) para 248 <[http://www.achpr.org/files/sessions/54th/state-reports/3-2008-2011/staterep3\\_cameroon\\_2013\\_eng.pdf](http://www.achpr.org/files/sessions/54th/state-reports/3-2008-2011/staterep3_cameroon_2013_eng.pdf)> accessed 13 October 2015.

<sup>77</sup> African Commission, 'Observation on Cameroon' (n 52) para 64.

<sup>78</sup> *Purohit and Moore v. The Gambia*, 241/01.

interpretation to 'ensure the full realisation' of the right. It may be argued that this latter provision is incompatible with the condition to take full advantage of available resources and must be interpreted in the light of that condition. 'Full realisation' would, therefore, be dependent on the specific situation of each state and the resources available to it. To this end, it may be posited that Cameroon is well within its duties to provide health care as long as it has taken 'full advantage' of its available resources, the latter being an assessment that must be left to the appropriate judicial authority.<sup>79</sup> However, the important question for the purpose of the chapter is whether to adjudge a state, say Cameroon in this instance, as having fulfilled its duty to protect health under the Charter because it has used its available resources to protect a tiny section of the populace while the majority is denied this protection. It is argued that this approach would defeat the essence of the Charter. In order to give full meaning to the dictates of the Charter, there is the need to add a further 'majority test' to the availability criterion. By this test, an adequate section (or majority) of the populace must be afforded protection according to the state's available resources for that state to be judged as having fulfilled its duty under the Charter. Where a majority of the populace is not protected, then that state must be adjudged to have failed in its duty whether it lacks the available resources or not. This, of course, would impose a huge task on states that lack the resources to adequately protect these rights but is important to create a more accurate picture and measurement of the protection of that right. Thus, the absence of resources should mainly be seen as a challenge to the implementation of rights and not as the main criterion for measuring compliance. It is only after the 'real' state of implementation has been accurately determined that a proper and effective solution can be proposed for the purpose of immanent critique, a task undertaken in Chapter 6 of this thesis. Accordingly, the studied countries, given their statistics on mortality from malaria and HIV and general lack of access to adequate healthcare, would be adjudged to have failed in fulfilling their duties under the right to health regardless of the amount of resources available to those countries.

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<sup>79</sup> See Chapter 6.

It is also important to state that, as is the case for some infringements discussed above, the exercise of the right to health could also be affected by certain cultural and religious beliefs. In one instance, Sudan reported that some parents refused to vaccinate their children against the measles outbreak because of their religious beliefs. In the ensuing court case,<sup>80</sup> 11 of such parents were convicted and fined for failure to provide necessities of life for their children. This exposition, like previously identified instances, is important for the subsequent analysis of the various factors inhibiting the implementation of rights contained in the Charter.

### *Right to Education (Article 17)*

As pointed out in Chapter 3, the Charter does not elaborate on the contents of this right but merely provides that everyone shall have the right to education. However, from the issues raised by both the Commission and states, one can deduce some of the contents and responsibilities covered under this right. One of these is the provision of free primary school education. Thus, the Commission has called on states to provide free and compulsory primary education, especially for the girl child.<sup>81</sup> Also, the states have generally taken to running free primary school education programmes even though the quality and sustainability of these programmes are often in doubt. Uganda reported that access to free primary education increased by almost 180% from 3.1 million pupils in 1996 to about 8.7 million in 2010, and further improving to 9.2 million pupils in 2012.<sup>82</sup> Nigeria and Malawi also reported the operation of free primary school education in their respective countries.<sup>83</sup>

States have also made strong attempts to extend free education beyond the primary level to secondary and even tertiary levels. For instance, Uganda reported the initiation of a Universal Secondary Education Programme which saw the award of free tuition to

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<sup>80</sup> *The Republic v. Jamison Ofesi and 10 others* (Criminal Cause No. 64 of 2010).

<sup>81</sup> See for instance African Commission, 'Observation on Cameroon' (n 52).

<sup>82</sup> Republic of Uganda (n 54) 4.

<sup>83</sup> See Republic of Nigeria (n 46) and Republic of Malawi (n 51).

at least four 'secondary school going children' per family.<sup>84</sup> Nigeria also reported the construction of 'junior girls' model secondary schools' in 13 states of the federation aimed at addressing the high rate of girls who were out of school.<sup>85</sup> Malawi reported a 'heavily subsidised' university education which had seen the literacy rate improve from 68% in 2000 to 84% in 2011.<sup>86</sup> Interestingly, the prevailing situation is similar to previously discussed rights despite the steps taken by states. Uganda has stated that in spite of the high enrolment in schools, retention rates, especially for the girl child, remained poor due to social, economic and cultural pressures.<sup>87</sup> Similarly, Malawi stated that the millennium development goal of achieving universal primary education by 2015 was unlikely to be met due to economic constraints.<sup>88</sup> In Nigeria, only about 44% of children of primary school entry age (age 6) were attending the first grade of primary school. North-South disparity was noticeable here with up to 92% attendance in the South West and only 48% in the North East signifying a link between attendance and other factors such as culture and poverty. The economic status of families was yet another indicator with the primary school net attendance ratio for children in rich households standing at about 94% compared to 34% in the poorest households.<sup>89</sup>

#### **4.5.3 States' View on Enforcement of Socio-economic Rights**

It is not clear from the State Reports whether states view socio-economic rights as having the same status as negative rights, especially as regards enforceability. One can, however, glean a view more in line with 'progressive realisation'.<sup>90</sup> This is more so the case given that most African countries do not grant enforceability to these rights in their constitutions. Thus, despite what may appear as the clear dictates and intent of the Charter, member states appear to have taken the easy route. With the exception of South Africa and, more recently, Kenya there is little indication of indivisibility in the

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<sup>84</sup> Republic of Uganda (n 54) 5.

<sup>85</sup> Republic of Nigeria (n 46) 4.

<sup>86</sup> Republic of Malawi (n 51) para 106.

<sup>87</sup> Republic of Uganda (n 54) 32.

<sup>88</sup> Republic of Malawi (n 51) para 107.

<sup>89</sup> Republic of Nigeria (n 46) 53.

<sup>90</sup> See Chapter 3.

jurisprudence of domestic courts across the continent.<sup>91</sup> For example, the Nigerian Court of Appeal has held that ‘the arbiter for any breach of the Objectives and Directive principles of State Policy is the legislature itself or the electorate.’<sup>92</sup> This precludes judicial intervention and suggests that the only way to guarantee these rights is for citizens to vote out incompetent governments—an unsatisfactory remedy given the long time it takes between elections and massive electoral malpractices that characterise many African elections. It has been argued that by relegating socio-economic rights to non-justiciable directive principles of state policy, states contradict one of the core principles of the African Charter.<sup>93</sup>

## **4.6 Peoples’ Rights**

As has already been discussed in previous chapters, Africa is peculiar for the multi-ethnicity and vast cultures in several of its countries. Consequently, there is the need to protect “all the peoples” of Africa especially indigenous groups and populations who may be at the risk of suppression by more dominant groups. Of the five countries studied, the Commission made observations on this group of rights for three countries namely Cameroon, Uganda, and Nigeria. Analysis of these will be done under the following two headings: Right to free disposal of wealth and natural resources with allusions to the right to economic, social and cultural development, and the right to a general satisfactory environment.

### **4.6.1 Right to Free Disposal of Wealth and Natural Resources and the Rights to Social and Cultural Development (Articles 21 & 22)**

The Commission identified serious breaches of this right by Cameroon. It criticised the delay in finalising the study on the identification of indigenous communities and lack of concrete steps taken to enact a law on indigenous populations as previously

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<sup>91</sup> Frans Viljoen, *International Human Rights Law in Africa* (OUP 2012) 218.

<sup>92</sup> *Archbishop Okogie v The Attorney-General of Lagos State* (1981) 2 NCLR 350 paras 7-8.

<sup>93</sup> Viljoen (n 91).



recommended both by the Commission and the United Nations Committee on the Elimination of Racial Discrimination. In its recommendations, the Commission directed Cameroon to enact, with the participation of the indigenous people, a specific law recognising the latter's rights of ownership over their ancestral lands. A similar directive had previously been issued both by the Commission, in its previous Concluding Observation of 2010, and the United Nations Committee on the Elimination of Racial Discrimination.<sup>94</sup> Indigenous populations were also to be allowed effective participation in all ongoing and future legislative and political reforms having an impact on their rights. The Commission also recommended the adoption of a quota system or co-optation for graduates from indigenous communities to facilitate their participation in decision-making institutions.<sup>95</sup>

In its report, Cameroon stated that it had begun discussions on the identification of indigenous populations in the country and also taken steps to ensure socio-economic inclusion of indigenous populations. The latter was accomplished through vocational training and consideration of the interests of indigenous populations in the forestry policy and hydroelectric projects.<sup>96</sup>

In Uganda's case, the Commission identified the need to establish laws that protect land rights and natural resources of indigenous populations. Legislative measures like Uganda's Forest Bill did not, in the Commission's view, take into adequate account the rights of indigenous peoples. Overall, indigenous populations were not fully aware nor effectively involved in decision-making processes on issues that directly affected them such as land and forest law reforms. Other expressed areas of concern on peoples' rights include: the expansion of agriculture and extractive industries which threatened the rights of indigenous populations to their ancestral lands, through the granting of land concessions for development projects without the prior, free and informed consent of the indigenous people; the lack of an appropriate legal framework to eliminate the

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<sup>94</sup> See African Commission, 'Observation on Cameroon' (n 52).

<sup>95</sup> *ibid* para 26.

<sup>96</sup> Republic of Cameroon (n 76) para 570.

discrimination and marginalisation of indigenous populations, particularly by ensuring that their customary ownership rights are promoted and protected under the law; and the absence of schools and health centres in close proximity to indigenous populations thereby limiting their access to basic social services.<sup>97</sup>

In response to the Commission's recommendation to establish laws that protect land rights and natural resources of indigenous populations, Uganda stated that Article 244 of its constitution provided for the enactment of legislation by Parliament to regulate the exploitation of mineral and the sharing of royalties. Despite having already passed two legislations on exploration, refining and gas processing, the Ugandan Parliament was yet to pass the draft Public Finance Bill which envisaged the payment of royalties to districts.

#### **4.6.2 Right to a General Satisfactory Environment (Article 24)**

Of the states studied, Nigeria was the most criticised in this regard. This was largely due to environmental degradation and damage caused by large-scale oil exploration and extraction. One such example is the case of the Ogoni people which has been briefly discussed in chapter 3.

In its observation, the Commission directed Nigeria to take all necessary steps to ensure that companies in the extractive industry lived up to the high standards of human rights as espoused in the Charter. This, in the Commission's view, could be done by, for example, revoking the licences of companies that failed to live up to such standards.<sup>98</sup>

In its response to the Commission's recommendation on environmental degradation, the Nigerian government stated that it had established the Nigeria Extractive Industries Transparency Initiative (NEITI) which was empowered to promote due process,

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<sup>97</sup> African Commission, 'Observation on Uganda' (n 64).

<sup>98</sup> Republic of Nigeria (n 46) 12.

transparency and accountability in extractive industries and to prosecute defaulters of the NEITI Act. The report, however, stated that greater political will and staff capacity building were the twin challenges that needed to be addressed before NEITI could perform credibly.<sup>99</sup> These added challenges of political will and human resources will be duly considered in Chapter 6.

#### **4.7 Women's Rights**

It would be recalled that an additional protocol to the Charter, in the form of the Women's Protocol, was adopted in order to better protect the rights of women in the continent. As such, the Commission has taken to calling member states' attention to violations of these rights. It should, however, be noted that, unlike the Charter, the Women's Protocol does not have near unanimous ratification as only 36 out of 54 states have ratified it as of May 2016.<sup>100</sup> Of the five states studied, only Sudan has failed to ratify the Protocol which inevitably raises the question of whether Sudan can rightly be assessed based on the provisions of the Protocol. While it should ordinarily be the case that Sudan would not be bound by the provisions of this Protocol not having ratified it (and furthermore, for the purposes of this thesis, not having accepted it as an internal/immanent standard), it should be considered that many of the Protocol's provisions can rightly be argued under the provisions of the Charter. What the Women's Protocol has mainly done, in essence, is to flesh out the rights in the Charter for the benefit of women. Accordingly, the Commission has taken to highlighting perceived violations in Sudan even though it has not ratified the Protocol, and Sudan has in turn routinely replied and addressed observations of breaches.

The major recurrent themes under which these rights will be discussed are: violence against women,<sup>101</sup> poor representation in government,<sup>102</sup> and inequality in marriage.<sup>103</sup>

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<sup>99</sup> Ibid.

<sup>100</sup> African Commission, <http://www.achpr.org/instruments/women-protocol>, accessed 25 May 2016.

<sup>101</sup> Women's Protocol, arts 3, 4 & 5.

<sup>102</sup> Ibid art 9.

<sup>103</sup> Ibid art 6.

#### 4.7.1 Violence Against Women (Articles 3, 4 and 5)

These are often either in the form of domestic violence or harmful practices such as female genital mutilation (FGM). With regard to the latter, Nigeria reported that 27% of its women aged 15-49 years had one form of genital cutting or the other. Here, results varied across geopolitical zones with 48% of such women coming from the South-West and only 3% from the North-East of the country. The distinction across zones is important in illustrating the role of culture and religion in either increasing or reducing this practice. Incidentally, FGM appears to be a popular practice among some African countries with the Commission further identifying its prevalence in Sudan<sup>104</sup> and Cameroon.<sup>105</sup>

Domestic violence was also identified in some of the studied countries with both the State Reports and Concluding Observations highlighting instances of violations in Nigeria, Sudan, Cameroon, and Malawi. Some instances of infringements were no doubt influenced by cultural perceptions of the superiority of the male gender, especially within the marriage setting. In its report, Nigeria detailed the results of a survey wherein 48% of women felt that their husbands or partners had a right to hit or beat them for at least one reason;<sup>106</sup> 48% of these were married women while 37% had never been married. Such dispositions, especially by the perceived victims of such actions, show that member states have failed in their duty to create awareness and sensitise the local populations on the rights of women.<sup>107</sup>

While it may well be argued that the prevalence of these practices is clear evidence of failure on the part of the member states, it has to be pointed out that some of these

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<sup>104</sup> African Commission, 'Observation on Sudan' (n 61).

<sup>105</sup> African Commission, 'Observation on Cameroon' (n 52).

<sup>106</sup> Some of these reasons include if the women neglect the kids or go out without telling their husbands.

<sup>107</sup> See Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, arts 5(a) and 8(c).

practices have flourished in spite of the efforts of governments. For instance, while highlighting the continued practice of FGM in Cameroon, the Commission stated that this was the case 'despite government efforts to eradicate it'. The Sudanese government reported the existence of a special unit within its Council of Ministers for combating violence against women and children. On its part, Malawi adopted policies and laws aimed at addressing some of the challenges affecting the family unit. One example is the Prevention of Domestic Violence Act which seeks to protect persons affected by domestic violence. Other legislative measures include the Domestic Violence Act, Employment Act 2006, Trafficking in Persons Act, 2009, and the Prohibition of Genital Mutilation Act, 2010.

#### **4.7.2 Inequalities in Marriage (Article 6)**

Article 6 of the Women's Protocol directs state parties to ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. Some of the ingredients of such equality are the free and full consent of both parties before a marriage can take place, a minimum age of 18 years for women, and the right of a woman to hold property in her name during and after the marriage.<sup>108</sup>

The reports show that early and forced marriages are rather common across the selected countries. In the case of Cameroon, the Commission observed the continuous practice of early and forced marriages among young indigenous girls which invariably affected their reproductive health. In its report, Nigeria provided statistics that showed that about 20% of young women aged 15-19 years were married with 8% being from the urban areas and 28% from rural areas. Only 6% of these had a secondary education while 72% had no education at all. Again, the numbers varied across geopolitical zones with the North-West having about 52% of early marriages while the South-East had just 2%. 18% of women were married before age 15 while 40% married before age 18, failing to

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<sup>108</sup> *ibid*, arts 6 a,b, and j.

meet the minimum standard set by the Women's Protocol. About 52% of married women aged 15-19 were married to men 10 or more years older many of which marriages were polygamous. The report pointed out that the results were significantly different between zones in the North and South as well as urban and rural areas. Again, this draws attention to issues of custom and literacy levels. The education of women was also identified as an important determinant.<sup>109</sup>

The reports show that some states have taken steps to enhance the protection of women's rights within marriage such as the right to own property. For instance, Uganda drew attention to its Marriage and Divorce Bill which was brought before parliament in May 2011. The Bill addresses women's rights during marriage including the right to own property both during and after the dissolution of a marriage.<sup>110</sup> On its part, Malawi pointed out that its constitution makes copious provisions for family and marriage rights. For instance Section 24 of the country's Constitution specifically provides for the rights of women granting them equal protection under the law and capacity to enter contracts, acquire property, and retain custody of children, amongst others. However, the state conceded that it faced challenges in ensuring equality of rights and responsibilities within the marriage set up due to a clear discrepancy between the declaration of equality in the Constitution and the actual relationship that exists between men and women. This was primarily due to cultural practices that favoured men over women and the male child over the female. Examples of such cultural practices were where a woman was forced to marry her brother-in-law following the death of her husband, or where a male child was given financial support to go to school while the female child was made to stay at home and look after the family. To tackle some of these challenges, a comprehensive review of laws on marriage and divorce was conducted which resulted in the Marriage and Divorce Bill. A Prevention of Domestic Violence Act was also passed to deal with cases of violence against women.<sup>111</sup>

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<sup>109</sup> Republic of Nigeria (n 46) 54.

<sup>110</sup> This Bill had not yet been passed into Law as at May 2015.

<sup>111</sup> Republic of Malawi (n 51) para 109.

#### 4.7.3 Political Participation (Article 9)

Another important area that the Commission has tasked the states on is in the political representation and participation of women. Article 9 of the Women's Protocol requires state parties to take 'specific positive action' to promote participative governance and the equal participation of women in the political life of their countries. The reports show a mixed result with some states having a fair and improving level of female participation in government and other states having less. For instance, the Commission commended Uganda on its 30% representation of women councillors and women in Parliament. The situation was slightly different in Cameroon. In its Initial Report of 2004, the government had presented information that showed a steady decline in the proportion of female Members of Parliament. From 14.5% in 1987, representation had fallen to 5.5% in 1997.<sup>112</sup> However, the country's subsequent report showed an increased female representation of 13.89% in 2008.<sup>113</sup> This notwithstanding, the Commission has recommended the enactment of a quota law and adoption of a 50% quota for women in order to increase their representation in decision-making. In its later report, the Cameroonian government stated that even though the prescribed 50% quota had not been attained, initiatives like the National Gender Policy were going a long way in guaranteeing the enjoyment of the same rights by both men and women.

While none of the studied states had met the 50% set by the Commission, steps were at least taken to carve out places for women in government. For instance, in Sudan, women were encouraged to participate in politics with the allocation of 25% of the legislative seats (in addition to other seats) in the 2008 Elections Act. As at the time of the report, women occupied 28% of seats in Parliament and their number in the National Legislature Council had risen from 7% in 2004 to 25% in the 2010 elections. Nigeria also noted the increase in women's representation in governance with 33% of female appointments at the federal executive level. Meanwhile, Malawi reported that women

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<sup>112</sup>Republic of Cameroon, *Cameroon's Initial Report* (2004) 120  
[http://www.achpr.org/files/sessions/31st/state-reports/1st-state-report/achpr31\\_staterep\\_cameroon\\_2002\\_eng.pdf](http://www.achpr.org/files/sessions/31st/state-reports/1st-state-report/achpr31_staterep_cameroon_2002_eng.pdf), accessed 23 October 2015.

<sup>113</sup> Republic of Cameroon (n 76) 48.

in the National Assembly had increased from 5.65% in 1994 to 22.85% in 2009. Also, several women had regularly vied for political positions with quite a few getting elected.<sup>114</sup>

An interesting observation was made by Cameroon which, in its initial report, noted that even though 30.6% of public employees were women, they were mostly concentrated at the lower levels of the public service hierarchy. Interestingly, the report states that one of the determinants of female distribution in the public service was whether men were willing to consent certain roles to women.<sup>115</sup> Just as with some of the few cases highlighted above, one can detect the influence of cultural and patriarchal leanings in the exercise and implementation of this right.

## **4.8 Conclusion**

The aim of this chapter has been to compare the practice of human rights by African countries with the theory as analysed in Chapter 3. Such comparison would reveal discrepancies, if any, between the theoretical standards and the practical reality thereby setting the stage for further analysis in subsequent chapters. In order to accurately evaluate the practice of the Charter by member states, this chapter analysed specialised reports that revealed the state of observance in the different key areas of the Charter (including its Protocol) such as civil/political rights, socio-economic rights, group rights, and women's rights. These reports revealed varying levels of discrepancies and violations of these classes of rights by member states. On a general level, it was found that the implementation of negative civil and political rights was characterised by state repression and brutality. Socio-economic and peoples' rights were poorly implemented, and women's rights implementation had not reached the desired level of the Women's Protocol. This is not to say that the states had not taken fruitful steps to abide by their

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<sup>114</sup> In the 2009 General Elections, 237 women contested for elected positions and 43 were elected. The only female contestant in the presidential race came fifth out of seven candidates. See Republic of Malawi (n 49) para 159.

<sup>115</sup> Republic of Cameroon, 'Initial Report' (n 112) para 482.



Charter duties and implement its provisions. Given the approach adopted in this research, of according importance to State Reports and Concluding Observations in determining compliance, it was found that states had often taken very direct and commendable steps towards protecting the rights guaranteed in the Charter and promoting the equality canvassed under the Women's Protocol. For instance, with regard to the latter, Sudan had allocated 25% of legislative seats to women in order to encourage their involvement in politics. Thus, while they could have a higher level of representation, 25% was the minimum threshold. Both Nigeria and Cameroon had female representations of over 30% in the federal executive and legislative governments respectively. Such direct attempts had also been made in areas of socio-economic rights where states had strived to make direct impacts in the health and educational sectors. It is believed that an acknowledgement of such positive efforts should characterise future assessments of human rights implementation in Africa. Thus, to the extent that it has been able, this chapter makes an important contribution to the extant literature by drawing attention to these feats and efforts by member states. It has however been concluded that, despite these efforts, the member states have not been able to meet the required thresholds of the Charter. Thus, these efforts often amounted to a part-fulfilment of responsibilities which often left glaring gaps in implementation.

Aside from determining the level of compliance with the Charter's theoretical standard, this chapter was relevant in extracting key themes and reasons for the state of partial or non-fulfilment of states' obligations under the Charter. These themes have been consistently identified throughout the progress of the chapter and include the lack of political will, lack of human and financial resources, poor economic conditions, cultural inclinations and stereotypes, poverty, ignorance, and illiteracy. Care has been taken not to digress into analysis and discussions of these challenges in this chapter. This is because, at this stage of measuring practice with theory, the aim is to identify the areas and causes of discrepancies. The identification of these areas and themes is important for the next phase of immanent critique which is an analysis and interpretation of these discrepancies. Accordingly, these themes will form the basis for analyses in Chapter 6

which seeks to understand and interpret these discrepancies thereby setting the pace for practical reform policies. Before this can be done, however, the second part of the current phase of immanent critique namely the institutional practice of the system will have to be examined. While this chapter has so far evaluated the practice of the Charter from the viewpoint of states, the next chapter will examine the practice by the regional institutions and whether these meet the standards set by the Charter.

In summary, therefore, the practice of human rights in Africa, according to the categories of the African Charter, is certainly a mixed bag. While there have been many positive legislative and other measures taken to promote these rights, there are still a number of entrenched practices and other lapses that create an overwhelmingly negative picture. As seen in the final summations above, states seriously default in all of the categories studied. While some of these defaults are owing to poor economic conditions and entrenched customary practices, others, especially in the civil and political rights category, boil down to undemocratic tendencies and lack of political will. This raises questions on the commitment of states to their obligations under the Charter. Thus far, there is still a huge gap between the theory of human rights, as contained in the Charter, and its practice by states.

## **Chapter 5**

### **5 The Charter's Institutions in Practice**

#### **5.1 Introduction**

Chapter 3 of this thesis studied the theory of the African Charter. That chapter was split into an analysis of the norms and rights in the Charter on the one hand, and an analysis of the institutional framework for the promotion and protection of these rights on the other. Chapter 4 then proceeded to examine how the rights and norms discussed in the first part of Chapter 3 were implemented by states. This chapter is a logical progression and investigates how the institutions discussed in the second part of Chapter 3 have lived up to their Charter responsibilities. Aside its relevance in meeting the overall aims of the research, this chapter is also important in contributing to the general literature on the peculiar challenges facing the Court—an area where there is surprisingly a dearth in the academic literature.

As stated in the methodology section, this chapter will rely on a number of sources in order to effectively measure the practice of the regional human rights institutions. The most important sources in this regard are the Activity and Mission Reports of the African Commission and African Court which contain information on the activities and challenges faced by these institutions. Other important sources include the online records of the institutions available on their respective official websites. These often reveal the most recent activities of the institutions, including newly filed or finalised cases, and upcoming events. Finally, the opinions and findings of commentators and jurists will be highlighted throughout the chapter.

## 5.2 African Human Rights Institutions

Two distinct bodies have been created to oversee the implementation of the Charter and its Protocol. They are the African Commission and the African Court, both of which have been introduced in Chapter 3. While the African Commission is charged with the promotion and protection of human rights, the Court is to complement the protective mandate of the Commission.<sup>1</sup> The creation of a Court to complement the protective mandate of the Commission can already be viewed as an admission, by the relevant parties, of the inadequacy of the former in that respect. Such reform further highlights the need for an examination of the current practice to determine the extent of cooperation between these two bodies and whether such cooperation has achieved its intended aim both under the Charter and the Court's Protocol. However, before examining the extent of the protective roles of both institutions, this chapter will briefly examine the promotional mandate of the Commission in practice and identify some of the challenges that arise in the fulfilment of this mandate.

## 5.3 Commission's Promotional Role in Practice

The Commission has carried out its promotional role through publications, resolutions and press releases, missions, lectures and conferences, research and State Reports. The Commission had previously set up a 'fairly respectable' documentation centre, for human rights studies and research, at its secretariat.<sup>2</sup> The Commission has also organised several seminars, symposia, and conferences aimed at promoting human and peoples' rights on the continent.<sup>3</sup> As part of its sensitisation programme, the Commission passed a 'Resolution on the celebration of an African Day of Human Rights'.<sup>4</sup>

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<sup>1</sup> African Court Protocol, art 2.

<sup>2</sup> Victor Dankwa, 'The Promotional Role of the African Commission on Human and People's Rights' (2002) in Malcolm Evans and Rachel Murray (eds) *The African Charter on Human and People's Rights: The System in Practice, 1986–2000* (CUP 2002) 352.

<sup>3</sup> Treva Braun & Lucy Mulvagh, *The African Human Rights System: A Guide for Indigenous Peoples* (Forest Peoples Programme, 2008) 25, [http://www.rightsandresources.org/documents/files/doc\\_1178.pdf](http://www.rightsandresources.org/documents/files/doc_1178.pdf) accessed 4 July 2014.

<sup>4</sup> See African Commission, 'Resolution on the celebration of an African Day of Human Rights' (1989) <http://www.achpr.org/sessions/5th/resolutions/1/> accessed 15 March 2017.

Governments and Commissioners were expected to engage in activities on 21 October, the day on which the Charter entered into force, with the aim of raising awareness of human rights and the Charter. The Commission has also collaborated with other institutions to hold conferences. One result of such conferences was the development of a draft of the Women's Protocol and the appointment of the Special Rapporteur on the Rights of Women.<sup>5</sup>

Commissioners, together with legal officers from the Secretariat, undertake promotional visits to a few countries each year. Article 46 of the Charter, which requires the Commission to use 'any appropriate method of investigation', is the legal basis for missions. The aim of such missions is to promote the rights in the African Charter and other regional instruments by engaging governments and civil society as well as gathering information, in particular in relation to the thematic mandates of the commissioners participating in the visit.<sup>6</sup>

Another key means of promotion is through the examination of State Reports which has been described as the core of the Commission's promotional mandate.<sup>7</sup> Through this process, the Commission examines reports of various states on the practice and implementation of human rights in those states and then makes recommendations for reform. These recommendations are often in the form of suggested policy and legislative reforms and ratification and implementation of treaties.

### **5.3.1 Challenges to Promotion**

The Commission's exercise of its promotional mandate has met with a number of criticisms and challenges. One of these criticisms concerns the Commission's failure to use the media and other outlets in creating the necessary publicity and awareness. While pointing out the Commission's failure in its promotional mandate, Kiwinda states

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<sup>5</sup> Dankwa (n 2) 340.

<sup>6</sup> Magnus Killander and Bright Nkrumah, 'Human Rights Developments in the African Union During 2012 and 2013' (2014) 14(1) AHRLJ 275, 281.

<sup>7</sup> Frans Viljoen, *International Human rights Law in Africa* (OUP 2012) 349.

the need to publicise the regional system through ‘publications, promotional missions, hosting more sessions in all states and through the mass media.’<sup>8</sup> Former Chairman of the Commission, Oji Umozuruike, notes that the Commission must ‘do more’ to advertise its work and disseminate its publications. He laments the lack of publicity of the Commission’s decisions many of which are not known even in the states where the complaints originated. Publicity, he argues, must be sought through enhanced cooperation with the media, NGOs and institutions of higher learning.<sup>9</sup> Similarly, Isanga has identified the need to educate Africans about the regional mechanism. He argues that except mechanisms like the Court are ‘popularised in the African consciousness [they] will remain at the periphery of peoples’ lives’.<sup>10</sup>

Another challenge to the Commission’s exercise of its promotional mandate is its lack of adequate funding.<sup>11</sup> Lack of funding means that the Commission cannot undertake promotional visits in many countries with its few visits being made possible only by donations from outside the continent.<sup>12</sup> In one instance, the Special Rapporteur on Prisons reported that, while he received numerous requests to conduct prison inspections in some countries, none materialised due to a lack of resources.<sup>13</sup> This situation also means that the overwhelmed commissioners cannot appoint enough staff to oversee day to day activities of the Commission. This problem of funding has remained persistent and unresolved with the call for financial and other support to the Commission being the most consistently recurring theme in the resolutions and decisions of both the OAU and the AU Assembly.<sup>14</sup>

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<sup>8</sup> Morris Mbondenyi, *International Human rights and their Enforcement in Africa* (LAP, 2014) 419.

<sup>9</sup> Oji Umozuruike, ‘The African Charter on Human and Peoples’ Rights: Suggestions for More Effectiveness’ (2007) 13 ASICL 179, 189.

<sup>10</sup> Joseph Isanga, ‘The Constitutive Act of the African Union, African Courts and the Protection of Human Rights: New Dispensation?’ (2013) 11 SCJIL 267, 301.

<sup>11</sup> This issue is examined at depth in Chapter 7.

<sup>12</sup> Michelo Hansungule, *The African Charter on Human and Peoples’ Rights: A Critical Review* (2000) 8 AYBIL 265, 298.

<sup>13</sup> African Commission, *23<sup>rd</sup> Activity Report* (2008), EX.CL/446(XIII).

<sup>14</sup> Viljoen (n 7) 179.

Following the AU's failure to come to its aid, the Commission has had to rely largely on external donations. Such donations have come from the European Union and United Nations Commission on Human Rights as well as foreign institutions like the Danish Agency for International Development, Swedish International Development Agency and Raoul Wallenberg Institute for Human Rights and Humanitarian Law.<sup>15</sup> With the support of these bodies, the Commission has been able to hire a few staff, organise conferences, and engage in other promotional ventures.

A third challenge is the lack of adequate support from states. For instance, in its most recent Activity Report,<sup>16</sup> the Commission stated that it was unable to undertake any promotional mission during the reporting period partly because the designated member states had not responded or authorised the requested promotional missions. Also, as highlighted in Chapter 4, the Commission's promotional duty has been severely affected by the failure of states to submit their reports as at when due, if at all. As of March 2016, 15 states were late by one or two reports while 23 others were late by three or more reports. Seven states had not yet made any submissions to the Commission. Such failure by states invariably results in an inability on the part of the Commission to perform its promotional mandate. As with other discrepancies relating to the Commission, this recurrent failure to transmit reports to the Commission will be further examined in Chapter 7.

## **5.4 Commission's Protective Role in Practice**

Chapter 3 has outlined the system of protection through communications to the Commission. It was stated that the bulk of the Charter's provisions on communications was dedicated to interstate communications. However, states have hardly put the system to use with only one interstate communication<sup>17</sup> completed with the decision

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<sup>15</sup> Umozurike (n 9) 187.

<sup>16</sup> African Commission, *37<sup>th</sup> Activity Report* (2015) [http://www.achpr.org/files/activity-reports/37/actrep37\\_2015\\_eng.pdf](http://www.achpr.org/files/activity-reports/37/actrep37_2015_eng.pdf) accessed 03 June 2016.

<sup>17</sup> Democratic Republic of Congo v Burundi, Rwanda, Uganda Communication 227/99.

given after the matter had been substantially resolved.<sup>18</sup> It was stated that, even though the Charter does not expressly state so, individuals and NGOs can make complaints to the Commission under Article 55 which provides for ‘communications other than those of state parties’.<sup>19</sup> It is this group of communications that forms the fulcrum of the present analysis.

#### **5.4.1 Individual and NGO Communications**

Communications from individuals and NGOs would need to pass admissibility tests based on the decision of a simple majority of members of the Commission. Some conditions that need to be met include compatibility with the African Charter and exhaustion of public remedies.<sup>20</sup> The Charter is largely silent on what happens after individual communications have been considered. Cues can, however, be taken from the provisions regarding state communications as well as Article 58 relating to special cases of serious or massive violations. With regard to the latter, the Charter provides that the Assembly of Heads of State and Government (‘the Assembly’) may request the Commission to undertake an in-depth study of such cases and make a factual report accompanied by its findings and recommendations. Similarly, on state communications, the Charter provides that the Commission may, while transmitting its report to the Assembly, make ‘such recommendations as it deems useful’.<sup>21</sup> As previously stated in Chapter 3, both of these provisions appear to limit the Commission’s role in the communications process to writing reports and making recommendations to the Assembly. Furthermore, all measures taken under the Charter are to remain confidential until the Assembly decides otherwise.<sup>22</sup>

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<sup>18</sup> Frans Viljoen, ‘Communications under the African Charter: Procedure and Admissibility’ in Malcolm Evans and Rachel Murray (eds) *The African Charter on Human and Peoples’ Rights: the System in Practice 1986-2006* (2nd edition CUP 2008) 137.

<sup>19</sup> It appears that, as part of the bid to facilitate ratification, the drafters of the Charter avoided stressing the individual’s role in the communications process.

<sup>20</sup> Art 56. Other requirements are that the communications indicate their authors, not written in disparaging language and not based exclusively on news disseminated by the media.

<sup>21</sup> Art 53.

<sup>22</sup> Art 59.



The Commission appears to operate on these principles of confidentiality for individual and NGO complaints with its Rules of Procedure setting out more detailed provisions on the procedure and steps to be followed in the communications process. Thus, hearings on communications are held in camera<sup>23</sup> with a final decision on the merit remaining confidential until its publication is authorised by the Assembly.<sup>24</sup> Such decision would then be transmitted to the parties and posted on the Commission's website.<sup>25</sup>

#### **5.4.2 The Nature of Recommendations**

It has already been pointed out that the Charter does not grant the Commission any express judicial authority under the communications procedure. By requiring the Commission to make 'recommendations' to the Assembly, it appears that the final say on the steps to be taken in the aftermath of a communication largely rests with the Assembly. Unfortunately, the Charter does not state what the Assembly should do after recommendations have been made and how effect, if any, would be given to these recommendations. Taking advantage of this loophole, the Commission has argued, not without merit, that its decisions become binding after they have been adopted by the Assembly after the latter's consideration of the Commission's annual Activity Reports.<sup>26</sup> Given that its decisions are routinely adopted by the Assembly, the practical implication is that they are binding on the states against whom they have been made. This position is, however, contentious—the reason being that the Charter did not make any clear provision in that regard. Also, what the Assembly 'adopts' is the Activity Report of the Commission which contains several matters aside communications. To impute to the Assembly the intention of adopting the particular decisions in each communication based on the mere adoption of the Activity Report appears to be a step too far. Such adoption, it is argued, is merely to make way for the publication of the report as

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<sup>23</sup> R 99(8).

<sup>24</sup> R 110(3).

<sup>25</sup> R 110(4).

<sup>26</sup> African Commission, *Information Sheet No.3: Communication Procedure* [http://www.achpr.org/files/pages/communications/procedure/achpr\\_communication\\_procedure\\_eng.pdf](http://www.achpr.org/files/pages/communications/procedure/achpr_communication_procedure_eng.pdf) accessed 27 November 2015.

envisaged under Article 59(3) of the Charter.<sup>27</sup> This position is more compelling given that one of the chief reasons for the creation of an African Court was the general perception of the non-binding nature of the Commission's decisions.

The Commission's position is tenable to the extent that the Charter intended for the Assembly to bestow binding character on the Commission's decisions. The Charter does not, however, state how this is to be done. Rather, it merely provides that reports on the activities of the Commission would be published only after they have been 'considered' by the Assembly. There is nothing to show that such publication or consideration would amount to bestowing binding force. The Commission's position and subsequent steps taken in furtherance of it must, therefore, be seen as going outside the dictates and intention of the Charter. It is important, at this stage, to point out that the aim here is not to criticise the Commission for 'stepping out of line'. Rather, it is to show a shift in practice from the set standard. An argument can be made here for the necessity of this shift given the poor protective mandate of the Commission under the Charter. How this shift is to be interpreted will be discussed more in Chapter 7. It is however important, in analysing the system in practice, to examine how the Commission has implemented its approach.

#### **5.4.3 The Commission's New Rules of Procedure**

The Commission's new Rules of Procedure make provisions for follow-up on decisions of the Commission. By following up on the implementation of its decisions, the Commission would not only keep track of the steps taken towards implementation but also apply pressure on states to implement its decisions. The approach of following up on the implementation of a decision could connote that such decision is binding or, at least, should be enforced. However, it should be noted again that this is not directly provided under the Charter nor is there any clear intent therein for such a procedure.

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<sup>27</sup> This article provides thus: 'The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.'

The provisions for revised follow-up procedures were no doubt influenced, at least in part, by a number of earlier studies on the effectiveness of such procedure in improving state compliance with decisions of the Commission. In one of such studies, Viljoen and Louw found that in four out of six cases of full compliance with the Commission's decisions, there had been some attempt by the latter to follow up on the steps taken by parties to implement its recommendations.<sup>28</sup> They concluded that as the Commission did not undertake any similar actions in the majority of 'noncompliant' cases, the issue of following up cases played a role in compliance.<sup>29</sup> In another research, Wachira and Ayinla proposed the establishment of an institutionalised follow-up mechanism by the African Commission for the purpose of monitoring the implementation of its decisions and the issuance of specific recommendations.<sup>30</sup> These propositions were obviously based on the proactive position that the Commission's decisions should become binding after the adoption of the Commission's Activity Report by the Assembly. Following this interpretation, Rule 112 of the Commission's amended Rules of Procedure provides for the steps to be taken towards following up on the implementation of the Commission's decisions on communications including the appointment of a rapporteur to oversee such implementation. The presence of a flaw in the Commission's approach, as well as those of earlier researchers, is evident from the provision of Rule 118 of the same Rules of Procedure. This Rule provides for the Commission to submit a communication to the African Court where the Commission considers that the respondent state has not or is unwilling to comply with its recommendations in respect of the communication. Such submission to the Court, it is argued, would be unnecessary were the Commission's recommendation to be binding as a decision of the AU Assembly as the appropriate body to take action in such an event would be the Assembly itself through warnings and sanctions.<sup>31</sup> The provision for a further referral to the Court only amounts to a concession on the binding nature of the recommendations in the first instance.

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<sup>28</sup> Frans Viljoen and Lirette Louw, 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1994-2004' (2007) AJIL 1.

<sup>29</sup> *ibid* 17.

<sup>30</sup> George Wachira and Abiola Ayinla, 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: a possible remedy' (2006) 6(2) AHRLJ 465

<sup>31</sup> See Chapter 7.

Furthermore, the existence or relevance of the Court which was created to complement the protective mandate of the Commission becomes questionable. Unlike in other regional systems—the Inter-American and former European human rights systems—the Commission performs both promotional and protective mandates without any appellate or clear system of referral to the Court. These two bodies operate distinctly of themselves with different Rules of Procedure. Were its decisions to be binding upon the mere consideration of its Activity Reports, the Commission would not have any need for the Court whose only clear distinctive characteristic is its judicial nature demonstrated by its authority to pass binding judgements. The creation of the Court would, therefore, amount to a mere duplication— two bodies delivering binding decisions both of which are to be enforced by the Assembly.<sup>32</sup>

#### **5.4.4 States' Response to Decisions of the Commission on Communications**

It would come as no surprise that states do not generally share the Commission's view on the binding nature of its decisions. Firstly, implementation of the Commission's decisions has generally been low. Recent studies have put the rate of full compliance at 12% (seven cases of implementation out of 60 decisions finding states in violation) with cases of partial compliance at 34%.<sup>33</sup> These statistics show very little improvement from the rate of compliance in earlier studies.<sup>34</sup> The general attitude of states, it has been pointed out, has generally been to ignore these recommendations, with no attendant consequences.<sup>35</sup> In the Commission's own assessment, 'member states generally do not comply with the decisions of the Commission or implement its recommendations'.<sup>36</sup> Even more seriously, some states have challenged the competence of the Commission

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<sup>32</sup> This is further explained in Chapter 7.

<sup>33</sup> The Open Justice Initiative, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions*, <http://www.opensocietyfoundations.org/sites/default/files/from-judgment-to-justice-20101122.pdf> accessed 15 March 2015.

<sup>34</sup> One such study had found 6 cases of full compliance between 1994-2004, as opposed to 13 cases of non-compliance and 14 cases of partial compliance. See Viljoen and Louw (n 28).

<sup>35</sup> Wachira and Ayinla (n 30).

<sup>36</sup> African Commission, *Combined 32<sup>nd</sup> and 33<sup>rd</sup> Activity Report* (2013) Para 28 [http://www.achpr.org/files/activity-reports/32-and-33/achpr5152\\_actrep32and33\\_eng.pdf](http://www.achpr.org/files/activity-reports/32-and-33/achpr5152_actrep32and33_eng.pdf) EX.CL/782(XII) Rev.2.

to issue binding decisions. In the case of *Good v. Botswana*<sup>37</sup> which involved the deportation of an Australian Professor in 2005 after he had co-authored an article concerning presidential succession in Botswana, the state (Botswana) in its response to a complaint brought before the Commission challenged the latter's authority to issue binding decisions. Even after the Commission's finding in favour of Mr Good, including an award of compensation, Botswana refused to comply. Botswana's Foreign Affairs Minister was quoted as saying:

'We are not going to follow the recommendation made by the Commission. It does not give orders, and it is not a court. We are not going to listen to them. We will not compensate Mr Good'.<sup>38</sup>

Aside final decisions of the Commission, states have also failed to comply with provisional measures. In the 1998 case of *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*,<sup>39</sup> the Commission called on Nigeria not to execute the complainant pending the final outcome of the communication before it. However, the government, in total disregard of the provisional measures issued, went on to execute the complainant. The Commission subsequently found that the death penalty imposed violated the African Charter.

Granted that it may very well be the case that other factors contribute to states' non-implementation of the Commission's decisions on communications, the apparent lack of binding authority certainly plays a central role in this state of affairs. It has even been noted that the Commission's lack of binding authority is the most cited reason for states' non-compliance with the Commission's decisions on communications.<sup>40</sup> In any event, it has to be pointed out that, in practice, several other factors contribute to the poor implementation of the Commission's decisions. It must also be noted that the non-binding status of these recommendations would not detract from their intended role of

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<sup>37</sup> Communication 313/05.

<sup>38</sup> Simisani Chilisa, 'Botswana Will Not Honour African Union Ruling on Prof Good', 02/08/2010 Sunday Standard News (Botswana, 2 August, 2010).

<sup>39</sup> Communications 137/94, 139/94, 154/96 and 161/97 (1998).

<sup>40</sup> Wachira and Ayinla (n 30) 471.

drawing attention to infringements of the Charter and facilitating the necessary reforms. Given that states are obligated under the Charter to give effect to its provisions,<sup>41</sup> they are therefore expected to implement these recommendations to the best of their abilities. It is important here to clear up any seeming contradiction with the earlier position that the Commission's decisions are not ordinarily binding on states. In the first instance, it was argued that the Charter intended for the Commission to make recommendations to the Assembly which would, should it deem necessary, see to their enforcement. However, in the latter case, it is argued that states, being ordinarily obligated to implement the Charter, should ideally view recommendations on communications as guides to such implementation. In this sense, such recommendations would be no different from recommendations in the Commission's Concluding Observations after having examined a state's periodic report. It is clear in such cases that those recommendations are only persuasive and lack general binding force. However, states are still expected to implement them and report on implementation in subsequent periodic reports.<sup>42</sup> The fact that states choose to ignore most of the Commission's recommendations issued in fulfilment of its protective mandate signals the absence of good will and the existence of other underlying factors aside the non-binding nature of these recommendations. As they affect the practice and implementation of the Charter, these factors are therefore relevant in the context of this research. Accordingly, the next sections will briefly examine two such factors namely the lack of political will and the failure by the Commission to specify clear remedies after finding a violation.

#### **5.4.5 Member States' Lack of Political Will**

The lack of political will is probably at the forefront of non-implementation of decisions arising from communications. Granted that recommendations may not be viewed as binding, states have often failed to implement them simply because they lack the will to

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<sup>41</sup> African Charter, art 1.

<sup>42</sup> Rules of Procedure of the African Commission on Human and Peoples' Rights 2010, r 78.

do so. The lack of binding force of these decisions, it can be argued, is therefore only a smokescreen behind which these states avoid performing their duties under the Charter. It has correctly been argued that the respect for and compliance by states with any decision by a supranational human rights body do not necessarily derive from the judicial or quasi-judicial nature of the decision-making body and the consequent nature of its decision, but depend on the presence of the requisite political will to honour their international treaty obligations.<sup>43</sup> This absence of political will is clear not only at the level of individual states but also at the level of the Assembly which consists of Heads of States of the respective member states. It should be recalled that the Assembly is indeed the 'chief enforcer'<sup>44</sup> of the Charter and of recommendations issued under the communications procedure. Articles 52, 53 and 58 of the African Charter make it clear that the Commission's role is merely that of passing on findings and recommendations, and 'drawing the attention' of the Assembly to special cases of massive violations. It is, therefore, the Assembly's prerogative to take whatever step it deems fit to ensure the implementation of these recommendations, a position it has evidently not been too keen to utilise. When one takes into consideration that the Assembly 'considers' final decisions of the Commission (as contained in the latter's Activity Reports) and is, given its composition, in the best position to take a strong stance against defaulting states, it becomes difficult to defend blatant non-implementation of these recommendations by the same states that approved their publication.

This lack of political will is even more concerning in cases of serious and massive violations of human rights. It would be recalled that the Charter mandates the Commission to draw the attention of the Assembly to such special cases.<sup>45</sup> However, it was found that the Assembly took no steps in five such special cases after clear noncompliance by states.<sup>46</sup> Accordingly, the Commission has stopped referring such

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<sup>43</sup> Wachira and Ayinla (n 30) 491.

<sup>44</sup> Ibid.

<sup>45</sup> Art 58.

<sup>46</sup> Viljoen and Louw (n 28) 20-21.

cases to the Assembly such that its practice has now gone into abeyance.<sup>47</sup> The Peace and Security Council, formed in 2003, has since become the de facto first port of call in such instances.<sup>48</sup>

The Commission itself has identified, as one of its major challenges to implementing its duties under the Charter, a general trend indicating the lack of political will by member states to support and cooperate with the Commission and its subsidiary mechanism. This is evidenced, *inter alia*, by failure to implement the Commission's decisions.<sup>49</sup> Such a declaration by the Commission highlights the central role that member states play in not only fulfilling their duties under the Charter but also ensuring that the Commission fulfils its.

#### **5.4.6 Commission's Failure to Provide Remedies**

Another impediment to states' implementation of the Commission's recommendation is the latter's failure to provide for specific remedies after reaching its decisions. It has been observed that the Commission has in some cases, after finding that a state is in breach of a Charter right, failed to provide a clear remedy. This failure to provide a clear remedy has been noticed in cases where the Commission awards compensation without determining what such compensation should be thereby leaving its determination to the defaulting state. Thus even in the rare case of a state willing to comply with the recommendation, it has occasionally been found that such compliance is not easy to determine or even implement. This challenge has mostly arisen in cases of financial compensation or the award of damages. For instance in *Embaga Mekongo Louis v Cameroon*<sup>50</sup> the victim claimed \$150 million as damages for false imprisonment and miscarriage of justice. The Commission found that the victim's rights had been breached and that he had in fact suffered damages. Acknowledging that it was unable to evaluate

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<sup>47</sup> *ibid.* See also Rachel Murray, 'Massive or serious violations under ACHPR: A comparison with the Inter-American and European Mechanism' (1999) NQHR 109, 128.

<sup>48</sup> By r 80 of the Commission's Rules of Procedure, the Commission is required to draw the attention of the PSC to cases of emergency.

<sup>49</sup> African Commission, Combined 32<sup>nd</sup> and 33<sup>rd</sup> Activity Report (n 36).

<sup>50</sup> Communication 59/91 (2000).



the amount of damages to be awarded, the Commission recommended that this be determined under the law of Cameroon. The lack of a policy to determine the quantum of damages in awarding compensation has been identified as a definite factor influencing state compliance. For instance, in their research, Viljoen and Louw found that in the six cases where the Commission had recommended the payment of compensation to victims without stipulating the amount, no compensation had been paid.<sup>51</sup>

A second, and even more serious, situation is where the Commission makes a finding of violation without providing for any remedy. Mbazira observes that, rather than make simple declarations of violation of rights, the African Commission often does not make any substantive recommendations to remedy the violations.<sup>52</sup> For instance, in *Huri-Laws v Nigeria*,<sup>53</sup> the Commission found Nigeria to be in violation of seven articles of the Charter including freedom from torture, right to a fair trial, right to property and right to liberty. However, the Commission went no further than this finding as it provided no remedy. It is easy to see how the failure to provide remedies could affect the implementation of the Commission's decisions as such failure allows for ambiguity and uncertainty over what particular steps are to be taken. Also, states and victims alike are less likely to take the Commission seriously where it acknowledges a serious breach of individual rights without accompanying remedies.

#### **5.4.7 The New Rule in Practice**

In establishing the Commission's position on the nature of its recommendations, it was stated above that the Commission introduced new follow-up measures to monitor and improve states' compliance with its decisions on communication. Having now briefly examined the response of states, as well as the hindrances to the implementation of

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<sup>51</sup> Viljoen and Louw (n 28) 22.

<sup>52</sup> Christopher Mbazira, 'Enforcing the economic, social and cultural rights in the African Charter on Human and Peoples' Rights: Twenty years of redundancy, progression and significant strides' (2006) 6. AHRLJ 333, 347.

<sup>53</sup> Communication 225/98 (2000).

these decisions, it is important to assess the impact, if any, of the Commission's new rules of procedure on follow-ups. Before this can be done, it is important to appreciate the content of this procedure.

By Rule 112, the parties to the communication are to inform the Commission in writing, within 180 days of being informed of the decision, of all measures of implementation taken by the state. The Commission may require further information from the state to which the latter is to respond within 90 days.<sup>54</sup> A reminder is to be sent in the event of the state's failure to respond on time. This process is monitored by a rapporteur who eventually submits a final report to the Commission.<sup>55</sup>

On the establishment of the follow-up procedure, there were concerns that reporting activities would not be well organised or consistently documented. To this end, it was suggested that a registry be established within the Commission's Secretariat to track compliance with the Procedure.<sup>56</sup> One possibility would be for the Commission to commit to reporting on implementation in its Activity Reports.<sup>57</sup> This suggestion obviously distinguishes Rule 112(9) by which the Commission is mandated to include information on any follow-up activities in its Activity Reports. While the latter appears to focus on providing information on the follow-up actions of the rapporteur, the former focusses on reporting on compliance by states with their responsibilities under the follow-up procedure. However, beyond asking parties to inform it of the steps taken to implement recommendations, the Commission's Activity Reports do not report positive steps on follow-up, nor do they detail steps taken by states towards compliance.<sup>58</sup> Even here, it is important to note that cooperation from the parties is necessary for a proper execution of this role and this appears to be lacking based on recent information from

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<sup>54</sup> R 112(3).

<sup>55</sup> R 112(5) and (7).

<sup>56</sup> The Open Justice Initiative (n 33) 112.

<sup>57</sup> Ibid.

<sup>58</sup> It is important to note that the Commission has only recently committed in its 36<sup>th</sup> Activity Report (Para 27) to include in later reports a section detailing implementation of its decisions by member states.

the Commission. For instance, the Commission has stated that despite an Executive Council Decision requesting parties to communications to provide the Commission with information on the implementation of recommendations, the latter have generally failed to do so notwithstanding letters and notes from the Commission to that effect.<sup>59</sup> This, in effect, means that there is a break in the chain of communication and the Commission is, therefore, unable to properly monitor implementation as envisaged under its new rules.

While the Commission generally appears to struggle for information on the state of implementation of its decisions, it has nonetheless provided such information in a few cases. Two of such instances are the already discussed case of *Good v. Botswana* and the *Endorois* case.<sup>60</sup> In the former, the Commission reported Botswana's unequivocal response through a diplomatic note thus: 'the government has made its position clear; that it is not bound by the decision of the Commission.'<sup>61</sup> In another case,<sup>62</sup> the Commission reported that Ethiopia had not complied with provisional measures to prevent irreparable harm to the victim.<sup>63</sup>

Reports on compliance have however not always been negative. For instance, the Commission has reported Cameroon's compliance with one decision including the payment of compensation to victims.<sup>64</sup> In another case, the complainant informed the Commission that the recommendation had been 'partially implemented'.<sup>65</sup>

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<sup>59</sup> African Commission, 37<sup>th</sup> Activity Report, Para 50, [http://www.achpr.org/files/activity-reports/37/actrep37\\_2015\\_eng.pdf](http://www.achpr.org/files/activity-reports/37/actrep37_2015_eng.pdf) accessed 30 December 2015.

<sup>60</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, communication 276/03.

<sup>61</sup> African Commission (n 35).

<sup>62</sup> - *The Indigenous Peoples of the Lower Omo (Represented by Survival International Charitable Trust) v Ethiopia*, communication 419/12.

<sup>63</sup> African Commission, 35<sup>th</sup> Activity Report, Para 27, [http://www.achpr.org/files/activity-reports/35/achpr54eos14\\_actrep35\\_2014\\_eng.pdf](http://www.achpr.org/files/activity-reports/35/achpr54eos14_actrep35_2014_eng.pdf) accessed 14 May 2015.

<sup>64</sup> Ibid.

<sup>65</sup> African Commission, 36<sup>th</sup> Activity Report, Para 25, [http://www.achpr.org/files/activity-reports/36/achpr54eos15\\_actrep36\\_2014\\_eng.pdf](http://www.achpr.org/files/activity-reports/36/achpr54eos15_actrep36_2014_eng.pdf).

In summary, it can be said that the Commission's new procedure on follow-up of its recommendations has been largely unsuccessful. This lack of success, as pointed out in the Commission's Activity Reports, owes largely to the lack of cooperation by states in playing their role as envisaged by the new rules. It is important to note the recurrence of the themes of political will and lack of cooperation by states both of which will be fully analysed in subsequent chapters according to the adopted structure of immanent critique. In the meantime, it is necessary to also examine the practice of the African Court and assess its performance based on the provisions of the Court's Protocol.

## 5.5 The Court's Protective Role

As explained in Chapter 3, the creation of a human rights court became imperative due to the Commission's weak protective mandate under the Charter. The Commission was seen as largely ineffectual<sup>66</sup> with its recommendations merely urging states to comply with its directives.<sup>67</sup> Thus, in the words of one writer, the Charter's remedy was ineffective and there was in fact, no remedy within the Charter.<sup>68</sup> This common position among writers led to clamours for the creation of a court with judicial and binding authority. In voicing the need for a court, some commentators appeared to question the significance of the Commission. It was believed that the Court would fill the huge void left by the Commission. For instance, Mutua opined thus:

The African Human Rights Court is a potentially significant development in the protection of rights on a continent that has been plagued with serious human rights violations since colonial rule. The problems of the African human rights system, including the normative weaknesses in the African Charter and the general impotence of its implementing body, the African Commission, may now be addressed effectively and resolved by the establishment of this new adjudicatory body.<sup>69</sup>

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<sup>66</sup> Makau Mutua, 'The African Human Rights Court: A Two-legged Stool?' (1999) 29 HRQ 342, 351.

<sup>67</sup> Christof Heyns, 'African Regional Human Rights System: The African Charter' (2003) 108 PSLR 679, 698.

<sup>68</sup> Vincent Nmehielle, 'Toward an African Court of Human Rights: Structuring and the Court' (2000) 6 ASICL 27, 39.

<sup>69</sup> Mutua (n 66) 353.

Viljoen was of the view that the mere existence of a Court would generate greater media interest and exposure and a much clearer identity in the minds of Africans.<sup>70</sup> Also, the 'psychological effect' of an international court's judgment on a state would be 'critical'.<sup>71</sup>

Given the wide support for a Court, the Protocol to the African Charter on Human and Peoples' on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) came into force in 2004. The Court itself was officially installed in 2006.<sup>72</sup>

### **5.5.1 The Court's Contribution to the Protection of Rights**

It will be recalled from Chapter 3 that the Court was created to complement the protective mandate of the Commission. As such, the Court does not share a promotional mandate. It however regularly undertakes promotional activities aimed at raising awareness about its existence as provided under its Rules.<sup>73</sup> These activities are mainly in the form of sensitisation visits,<sup>74</sup> regional and continental seminars, retreats, and networking.<sup>75</sup>

A proper assessment of the Court's protective role is marred by its lack of decided cases, a situation which could nonetheless provide a basis for evaluating its performance thus far. Even though the Court had been installed in 2006 with judges appointed, by 2010 the Court had received only one application which was struck out for lack of jurisdiction.<sup>76</sup> The lack of a registry, offices, budget, and even rules of Court, meant that

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<sup>70</sup> Frans Viljoen, 'A Human Rights Court for Africa, and Africans' (2004) 30 BJIL 1, 22.

<sup>71</sup> Nmehielle (n 66).

<sup>72</sup> African Court, <en.african-court.org> accessed 2 April 2016.

<sup>73</sup> African Court Protocol, r 11(d).

<sup>74</sup> Sensitisation visits have been made to Gambia, Cameroon, Côte d'Ivoire, Kenya, Burundi, Mauritius, and Senegal, amongst others.

<sup>75</sup> The Court establishes formal relationships with similar bodies like the Inter-American Court of Human Rights and the United Nations International Criminal Tribunal for Rwanda.

<sup>76</sup> African Court, 'Report of the African Court on Human and Peoples' Rights on the Relevant Aspects Regarding the Judiciary in the Protection of Human Rights in Africa by Justice Sophia A. B Akuffo, President of the Court'.

the judges could not begin receiving applications. The first two years were therefore spent negotiating a host agreement for the seat of the Court in Tanzania, devising a registry structure, recruiting registry staff, submitting budget proposals and adopting an Interim Rules of Procedure.<sup>77</sup> By September 2012, the Court had received 21 applications in contentious matters and three requests for advisory opinions and conducted two public hearings on contentious issues of public interest.<sup>78</sup> By December 2015, the Court had received about 60 applications on contentious cases of which less than half had been finalised<sup>79</sup> and nine requests for advisory opinions. While these numbers are obviously low, concerns are compounded by the fact that all but two of the Court's finalised cases merely entailed striking out the cases on the ground of lack of jurisdiction. Thus, in the court's decade of operation, it had found violations of human rights in only two cases.<sup>80</sup> Such a poor record—which logically translates to the Court's contribution to the protection of human rights—prompts questions on the causes and factors behind the lack of cases and impediments to the Court's discharge of its duties. These are discussed in the sections below.

### **5.5.2 Factors Impeding the Court's Discharge of its Duties**

This section will examine the impact of the following factors on the Court's discharge of its duties: Ratification of the Court's Protocol, failure to make the declaration under Article 34(6), non-compliance by member states, restrictions on the Court's reporting, limited use of the Court's resources, and the lack of human and material resources.

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[http://en.african-court.org/images/Other%20Reports/Report of the African Court on Human and Peoples Rights in the Protection of Human Rights in Africa final.pdf](http://en.african-court.org/images/Other%20Reports/Report_of_the_African_Court_on_Human_and_Peoples_Rights_in_the_Protection_of_Human_Rights_in_Africa_final.pdf) assessed 13 September, 2015

<sup>77</sup> *ibid.*

<sup>78</sup> *Ibid.*

<sup>79</sup> 25 finalised cases and 35 pending cases. Interestingly, an updated review of the Court's case list shows that the number of cases has improved to 97 as at May 2016 (26 finalised cases and 61 pending cases). This is largely owing to nearly two dozen suits instituted against Tanzania at the start of 2016. <http://en.african-court.org/index.php/13-homepage2/2-list-of-all-cases#pending-cases> accessed 29 May 2016.

<sup>80</sup> This number had increased to three by 2016.

### *Ratification and Art 34(6) Declaration*

While there may be a debate on the level of acceptance of the Commission's authority over states, the lack of acceptance of the Court is even more glaring. Unlike the Charter which has a near total acceptance in the form of ratifications, the African Court Protocol, as of February 2016, had been ratified by only 30 African countries<sup>81</sup>—a little over half of the continent's total number. As a direct consequence of this, complaints cannot be initiated against these countries as they have not accepted the jurisdiction of the Court. While this in itself is a huge limitation, it is compounded by the reluctance of states to make the declaration under Article 34(6) of the Protocol. By this provision, a state may make a declaration accepting the competence of the Court to receive cases from individuals and NGOs<sup>82</sup> against such a state. Where the respondent state has not made such a declaration, the Court would only be able to receive complaints from the Commission, states, and intergovernmental organisations.<sup>83</sup> So far, only eight countries have made the declaration. What this means in effect is that individuals and approved NGOs can only bring applications against seven member states<sup>84</sup> out of a total of 30 states that have ratified the Protocol.

The Court has constantly identified the low level of ratification and lower number of declarations as significant challenges to the effective discharge of its judicial mandate.<sup>85</sup>

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<sup>81</sup> These are: Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Cote d'Ivoire, Comoros, Congo, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, Sahrawi Arab Democratic Republic, South Africa, Senegal, Tanzania, Togo, Tunisia and Uganda. . See African Court, <<http://en.african-court.org/index.php/12-homepage1/1-welcome-to-the-african-court>> accessed 19 July 2016.

<sup>82</sup> Such NGOs must have observer status before the Commission.

<sup>83</sup> Court's Protocol, art 5.

<sup>84</sup> Burkina Faso, Ghana, Malawi, Mali, Rwanda, Tanzania and Republic of Cote d'Ivoire. See African Court, <http://www.african-court.org/en/index.php/about-the-court/brief-history> accessed 18 December 2015.

Rwanda later announced that it was withdrawing its declaration allowing individual access to the Court. Another country Benin Republic made the declaration allowing individual access in February 2016. See African Union, List of countries which Have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court On Human and Peoples' Rights < [http://www.au.int/en/sites/default/files/treaties/7778-sl-protocol to the african charter on human and peoplesrights on the establishment of an african court on human and peoples rights 17.pdf](http://www.au.int/en/sites/default/files/treaties/7778-sl-protocol%20to%20the%20african%20charter%20on%20human%20and%20peoples%20rights%20on%20the%20establishment%20of%20an%20african%20court%20on%20human%20and%20peoples%20rights%2017.pdf)> accessed 18 June 2016.

<sup>85</sup> African Court, Activity Report 2013, para 116 EX.CL/783(XXII).

Apart from hindering the initiation of applications, this limitation saw the dismissal of most of the early applications brought before the Court. The Court adjudicated on questions of admissibility and merits for the first time in 2013 because all previous applications had not been within its jurisdiction either because the matter was against a state that had not ratified the Court's Protocol or had not made the Article 34(6) declaration. Accordingly, the Court has stated that this impediment seriously compromises the effective discharge of its mandate and, if allowed to continue, would adversely affect the entire system of judicial protection of human rights at the continental level.<sup>86</sup>

It can be argued that by failing to ratify the Protocol, the defaulting states do not want to be held accountable for infractions of the Charter and other human rights treaties that they have signed up to. Thus, while appearing to uphold the theory of human rights, they are not dedicated to ensuring a corresponding practical application. Equally questionable are the other half that have ratified but failed to make the Art 34(6) declaration—a failure that effectively waters down the initial ratification. The Protocol's Preamble declares a firm conviction on the need for a Court to complement the Commission on the attainment of the Charter's objectives. However, the failure of 23 member states, out of 30 ratifications, to make the Art 34(6) declaration appears to conflict with this affirmation. As individuals and groups are the sole beneficiaries of rights under the Charter, denying them the ability to bring claims before the Court, and limiting such ability to the Commission, state parties, and African Intergovernmental Organisations is a clear sign of double standards. It is also an indirect way of hindering applications as these bodies have thus far not shown much zeal in bringing individual complaints forward.

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<sup>86</sup> African Court, Activity Report 2012, EX.CL/718(XX).



### *Non-Compliance by Member States*

A recurrent theme in this chapter has been the necessity of creating a court due to the unenforceability of the Commission's recommendations. Unlike the Charter, the Court's Protocol is unambiguous in its assertion of the binding authority of the Court. Article 28(2) of the Protocol states that the judgment of the Court decided by a majority shall be final and not subject to appeal.<sup>87</sup> By Article 30, state parties undertake to comply with the judgment in any case to which they are parties and to guarantee its execution. These provisions are also reiterated in the Court's Rules of Procedure.<sup>88</sup> However, while these provisions clarify the Court's binding power, they do not necessarily guarantee compliance. Member states' cooperation is still crucial. While it is hard to measure member states' acceptance of the Court's binding authority due to the dearth of negative findings against states, their general disposition can be gleaned from the reactions to provisional measures made by the Court. So far, the Court has issued two provisional measures against Kenya and Libya. While the former complied with the Court's orders, the latter blatantly refused to comply.<sup>89</sup> The latter order concerned the detention and possible ill-treatment of Saif Al-Islam Gaddafi, son of the deposed Libyan leader, Moammar Gaddafi. Libya neither responded to the order nor the reminder sent after the deadline for response prompting the Court to file an Interim Report with the Secretariat of the African Union Commission (AUC) 'with a view to drawing the attention of the Executive Council to [the non-compliance], and for the Council to bring the matter to the attention of the Assembly.'<sup>90</sup> Libya's non-compliance led the Court to cite the lack of cooperation from state parties as one of the serious challenges in the implementation of its judicial mandate. The Court summarised this challenge as follows:

The failure of Libya to comply with the Order of the Court threatens the very foundation of the existence of the Court as a judicial arm of the African Union. It erodes public confidence in our judicial system and mobilises negative public perception about the ability of the Court to protect human rights on the

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<sup>87</sup> There is also a provision for review of the Court's decision in the light of new evidence under art 28(3).

<sup>88</sup> R 61.

<sup>89</sup> African Court, 'Activity Report 2013' (n 85).

<sup>90</sup> Ibid.

continent. Furthermore, such non-compliance by any member state has a tendency to put into question the credible utility of the judicial system created by the African Union for the enforcement of the African Charter on Human and Peoples' Rights.<sup>91</sup>

#### *Restriction on the Court's Reporting*

Another challenge cited by the Court is the newly imposed reporting procedure. By Article 31 of the Court's Protocol, it is required to report to each regular session of the Assembly. The Court has carried out this function accordingly. However, in 2012, the AUC directed that organs of the Union, including the Court, were henceforth required to report only once a year, that is, in any of the two annual summits of the Union. The Court contends that this requirement limits it from reporting incidences of non-compliance as well as situations of serious human rights violations that may arise. For instance, this directive made it 'difficult' to bring the attention, in May 2013, of the Executive Council to Libya's non-compliance as, when the matter was to be brought up, the Court was not scheduled to present any report having already presented one in January. As such, the report was only noted under 'any other business' and was not transmitted to the Executive Council.<sup>92</sup>

#### *Limited Use of the Court's Resources*

While it is clear that the low number of ratifications and permission of individual applications severely limit the use and reach of the Court, there are other benefits of the Court that are not sufficiently utilised by the intended beneficiaries. One such benefit is the request for advisory opinions. By Article 4 of the Court's Protocol, a member state of the AU, the AU, any of its organs, or any African organisation recognised by the AU, may make a request to the Court to provide an opinion on any legal matter relating to the Charter or any other relevant human rights instrument. It is important to note that this resource is offered to states on the basis of their membership of the AU regardless of whether they have ratified the Protocol or not. However, only a

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<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

few of such requests have been made—as of May 2016, the Court had recorded only 11 requests for advisory opinions.<sup>93</sup>

#### *Lack of Human and Financial Resources*

The Court has cited other impediments such as the part-time nature of the judges' work and the inadequacy of resources. On the former, the Court has stated that as judicial work can only be done when the judges meet during quarterly sessions, this inevitably results in delays in finalising some matters.<sup>94</sup> With regard to the latter, the Court notes that it suffers from a shortage of resources. For instance, there were staff shortages in every department of the registry compelling staff to perform functions for which they had little competence. The Court also reported a lack of basic furniture and working equipment for judges and staff members alike.<sup>95</sup>

### **5.6 The Relationship between the Commission and Court**

The next evaluation of practice is on the relationship between the Commission and Court. Thus, do both institutions interact as envisaged and what impact would their interaction, or lack thereof, have on their duty to protect human rights? At the risk of repetition, it is worth reiterating, in the briefest fashion, the standard of relationship as already explained in Chapter 3. The first is that the Court complements the Commission's protective mandate. This it does by passing binding judicial decisions. Additionally, the Commission is entitled to submit cases to the Court<sup>96</sup> and the latter may transfer inadmissible cases to the Commission.<sup>97</sup>

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<sup>93</sup> African Court, <http://en.african-court.org/index.php/13-homepage2/2-list-of-all-cases#advisory-opinions> accessed 29 May 2016.

<sup>94</sup> African Court, 'Activity Report 2013' (n 85) para 115.

<sup>95</sup> Para 120.

<sup>96</sup> African Court Protocol, art 5(1)(a).

<sup>97</sup> *ibid* art 6(3).

The Commission's Rules of Procedure make provisions for when the Commission is to submit a communication to the Court pursuant to Article 5(1) of the Court's Protocol.<sup>98</sup> The first instance is where a state is unwilling to comply with the Commission's recommendations with regard to a communication. The Rules provide that the Commission may, in this instance, submit the communication to the Court. The Court may make similar submissions where provisional measures have not been complied with or in situations of serious or massive violations of human rights. Finally, it is provided that the Commission may seize the Court at any stage of the examination of a communication 'if it deems necessary'.<sup>99</sup>

However, the records show that the African Commission has not been performing optimally in this regard as it has submitted only three cases against two countries: Libya and Kenya.<sup>100</sup> In the first Libyan case, the Commission submitted the communication to the Court on the ground of serious and massive violations of human rights.<sup>101</sup> In the second case,<sup>102</sup> the Commission submitted the communication on the ground that Libya had not complied with its provisional measures while the case against Kenya was submitted on the ground of serious and massive violations of human rights.<sup>103</sup>

It is obvious that the Commission has not taken full advantage of submitting cases to the Court. This is clear not only from the few cases submitted but also the failure to submit finalised communications where the Commission has reached a decision and the respondent state has failed to implement or comply with such decision. It is important here to note that, given the already discussed challenges of individual/NGO access to the Court, the Commission is a very important source of cases reaching the Court. It is no surprise therefore that the Commission's lack of initiative in presenting cases to the

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<sup>98</sup> Rules of Procedure of the African Commission 2010, r 118

<sup>99</sup> *ibid*

<sup>100</sup> African Court, <http://en.african-court.org/index.php/13-homepage2/2-list-of-all-cases#pending-cases> accessed 29 May 2016

<sup>101</sup> *African Commission v Great Socialist People's Libyan Arab Jamahiriya*, Application 004/2011

<sup>102</sup> *African Commission v. The Republic of Libya*, Application 002/2013

<sup>103</sup> *African Commission v Republic of Kenya*, Application 006/2012

Court has been identified as the principal problem in getting the African Court to hear meritorious cases.<sup>104</sup>

Two reasons can be proffered for this situation. The first is that the Commission has succeeded in finalising few communications in recent years and most of the respondent states in those cases are not parties to the Court Protocol.<sup>105</sup> Another even more important concern is that the Rules appear to put the issue of referral at the discretion of the Commission, a discretion which appears not to have been optimally exercised. Both of these challenges are addressed in Chapter 7. At this stage, it can only be noted that the expected cooperation between the two institutions has not resulted in the improved protection of human rights.

## **5.7 Practice in Numbers**

This final section seeks to evaluate the practical reality of the institutions' protective mandates based on the statistics of their use and finalised decisions. Thus, do the statistics on the use of the Commission or in the number of findings against states measure up to reports of human rights violations as illustrated in Chapter 4?

A brief outline of the Court's statistics has already been set out above where it was pointed out that the Court had been seized of relatively few cases. As at the end of 2015, the Court had recorded only 60 contentious cases although this number had increased to 97 by the middle of 2016 owing largely to nearly two dozen new suits filed against Tanzania at the turn of the year.<sup>106</sup> On the other hand, an examination of the Commission's Activity Reports and list of cases reveals that, in its 28 years of existence, the Commission has presided over about 470 cases, delivering decisions in less than half of these. While these numbers show low levels of utilisation (especially given the

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<sup>104</sup> See The Open Justice Initiative (n 33) 96.

<sup>105</sup> Viljoen, 'International Human Rights Law in Africa' (n 6) 460.

<sup>106</sup> African Court, <http://en.african-court.org/index.php/13-homepage2/2-list-of-all-cases#pending-cases> accessed 29 May 2016.

findings of violations in the previous chapter), more concerns are raised over the fact that the Commission is yet to deliver a decision for or against nearly half of AU member states.<sup>107</sup> What this means is that the Commission's protective mandate has not been of practical consequence in those states. The Court's situation is even direr given that it can only extend its protective mandate to 30 countries, a number that drastically reduces to eight when the issue of individual access is considered. However, while the Court is hindered by these jurisdictional limitations, the Commission is not. Given that the Charter envisaged protection for the entire continent, the Commission's failure to find any violation against nearly half of its members must be identified as a discrepancy between the set standard and the actual practice.

Finally, it is important to assess what the low numbers on usage mean for human rights practice. For more viability, there is the need to illustrate this from the relative perspective of other regional human rights systems and from the peculiar situation of Africa given the analysis of the previous chapter. For instance, by way of comparison, the much older European system is saddled with cases and faces recurrent backlog challenges. For instance, at the start of 2010, there were nearly 120,000 applications pending before a decision body of the European Court of Human Rights.<sup>108</sup> The court's caseload has multiplied tremendously such that more than 90% of its judgements have been delivered between 1998 and 2008 alone.<sup>109</sup> Considering that the African Charter has more signatories with corresponding higher reports of violations, one would expect a similar or even higher number of complaints and caseload. This, unfortunately, has not been the case. A number of reasons have been adduced for this anomaly. Probably the most common of these is the failure by the institutions to undertake adequate promotional measures and effective advertisement. For instance, Viljoen has argued that the Commission has been 'ineffective in disseminating information about its existence and its case law and has failed to exploit media exposure possibilities'.<sup>110</sup>

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<sup>107</sup> African Commission, *Combined 32<sup>nd</sup> and 33<sup>rd</sup> Activity Report* (n 36) 6.

<sup>108</sup> The Open Justice Initiative (n 34).

<sup>109</sup> *ibid.* The role of new member states, like Russia and Turkey, should be taken into account

<sup>110</sup> Viljoen, 'A Human Rights Court for Africa' (n 70) 21.

Similarly, Heyns has pointed out that failure in educational and other initiatives has led to a 'minute number of cases per year' and even no cases in respect of some countries with the worst human rights records.<sup>111</sup> Also, in accessing the Commission's record of 241 communications after its first 14 years of existence, Odinkalu stated thus: 'The conclusion from this has to be that the Commission is very much unknown and underutilised.'<sup>112</sup> More recently, Isanga has opined that part of the reasons for few cases reaching the Court 'may be due to the fact that very few Africans or organisations even know of the existence of the African Court or of their rights'.<sup>113</sup>

Another contributing factor, at least in the case of the Commission, is the low level of participation of NGOs in the communications process. A 2011 study found that, out of 44 decided cases on the merit between the year 2000 and 2009, 30 had the direct involvement of NGOs either as representatives, applicants, or amicus.<sup>114</sup> Consistent with these findings, a previous review of the Commission's Activity Reports found that a majority of applications—28 out of 48—that led to decisions on the merits from 1997 to 2003 had been filed by one or more NGOs.<sup>115</sup> Given their crucial contribution, it is, therefore, reasonable to assume that an increased participation of these bodies in the communications process would invariably translate to more communications been filed. Accordingly, a section of Chapter 7 is dedicated to examining the relationship between NGOs and the Commission/Court and how this relationship could be further developed to improve human rights protection.

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<sup>111</sup> Christof Heyns, 'Some thoughts on Challenges facing the International Protection of Human Rights in Africa' (2009) 27 NGHR 447.

<sup>112</sup> Chidi Odinkalu, 'The Role of Case and Complaints Procedures in the Reform of the African Regional Human Rights System' (2001) 2 AHRLJ 225, 244.

<sup>113</sup> Isanga (n 9) 285.

<sup>114</sup> Lloyd Hitoshi Mayer, 'Collection of Data from the Decisions Rendered by the African Commission, European Court and Inter-American Commission and Court from 2000 to 2009' (May 22, 2011) (unpublished collection, Notre Dame University) 934.

<sup>115</sup> Annakaun Lindblom, Non-Governmental Organisations in International Law cited in Lloyd Hitoshi Mayer.

## 5.8 Conclusion

This chapter set out to evaluate the Charter's institutions in practice with a view to determining whether they have lived up to their stated roles and responsibilities. Overall, it was found that the Commission and Court had failed to adequately perform their stated duties of promotion and protection. While the former was evident in the poor utilisation of both bodies, the latter could be seen in the poor records of compliance, ratification, and Article 34(6) declarations. In the case of the Commission it was explained that, in order to make up for its weak mandate under the Charter, the Commission had adopted a rather positive stance on the nature of its recommendations after the consideration of its Activity Reports by the Assembly. It was argued that this stance acutely exposed the weakness in the Charter and demonstrated a clear instance of discrepancy from the set standard. In furtherance of its stance, the Commission adopted new follow-up measures in its Rules of Procedure to monitor and improve the rate of compliance with its recommendations. However, it was shown that these new rules have largely failed to meet their aims as states have mostly failed to report on the steps taken to implement decisions even after several reminders from the Commission.

It was also considered that, their non-binding nature notwithstanding, states still had a duty under the Charter, or at least were free, to implement the decisions of the Commission. Failure to do so, therefore, meant that there were other factors aside the non-binding nature of recommendations that contributed to poor compliance. One major factor was the lack of political will on the part of member states to implement these recommendations. It was also found that the Commission had occasionally compounded this challenge by failing to provide or specify remedies after having found a state to be in violation of the Charter.

The impact of the lack of political will was more noticeable in the case of the Court where only seven states had made the Article 34(6) declaration allowing individual and NGO applications and only 53% had ratified the Protocol. It was also found that at least one state had not complied with a provisional measure issued by the Court.



Another major challenge was the lack of human and financial resources to carry out the assigned tasks of both institutions. This was a major restraint for the Commission especially in the area of promotion. Thus, such tasks as embarking on promotional missions and advertising the protective role of the Commission were often hindered by the lack of funds. This was also a challenge for the Court which reported staff shortages and lack of office furniture as impediments to its operation.

On the relationship between the Court and Commission, it was found that the latter had not developed a viable system or practice of submitting communications to the Court. Such failure further compounded the Court's dearth of cases. On the actual practice of the institutions, it was found that there was very low general usage of both the Court and Commission. This limited use could be attributed mainly to such challenges as non-enforceability in the case of the Commission and Committee, and the lack of ratifications and Article 34(6) declarations in the Court's case. However, there have also been questions on the institutions' efforts to create more awareness and sensitisation.

At the end of this assessment, it is concluded that the institutions have not been able to meet their mandates under the Charter. However, the major causes of this have been the weak and compromising nature of Charter provisions as well as the sheer lack of political will by member states. In either case, there is a clear discrepancy between the practice and the set standards. Having established this, this thesis will move on to the next stage of immanent critique which involves interpretations and analyses of these discrepancies as well as possible reform measures. As was done in the last two chapters, this next phase will be discussed in two chapters. While the first of these will address the challenges cited in Chapter 4, the second will address the challenges highlighted in this chapter.

## Chapter 6

### **6 ANALYSES, INTERPRETATION AND IMPLICATION OF DISCREPANCIES BETWEEN THE THEORY OF RIGHTS AND STATES' PRACTICE OF THE CHARTER**

#### **6.1 Introduction**

The research has so far set out the normative standards of the African human rights system and then proceeded to investigate the actual practice of these set standards. This chapter, which begins the next phase of immanent critique, is the first step towards reconciling the work done so far by setting out and analysing the discrepancies revealed between the system in theory and practice. It focuses mainly on the discrepancies from the point of view of member states as opposed to the regional institutions which will be analysed in the next chapter. The aim is to interpret and determine the reasons for these discrepancies, many of which have been identified in Chapter 4, as well as their implications for the African regional human rights system. To this end, various intellectual positions and ideas on the effectiveness of the African regional human rights system will be analysed. The chapter, and by extension the research, aims to make its own original assessment of the viability of the African Charter model of rights both in present times and at the time of its creation. Such an assessment will not be done *in vacuo* but will be based on analyses and findings of previous chapters. On this note, this chapter will set out the discrepancies revealed in previous chapters such as the failure of states to protect Charter rights. It will then go on to analyse the cause and impact of these discrepancies with the aim of resolving some of the questions set out in the methodology section such as: Are the theoretical norms and standards of the Charter too ambitious that expectations should be scaled down? Are some discrepancies owing to ambiguities in the law? Should it be the case that the laws are not considered too ambiguous, then are the states to blame? Are the states true and sincere to their stated

duties such that the discrepancies are only caused by factors beyond their control such as poverty, war, and general lack of resources? Or is it the case that they proclaim these norms and then simply act in a conflicting manner?

It is mainly in the resolution of such questions as have been set out above that the relevance of the adopted methodology is appreciated. The resolution of these questions and the adopted approach in addressing them are what set the research apart from the available literature and ensure important contributions to knowledge in the field. Such contributions are punctuated by the ultimate aim of immanent critique which is to make, or at least set the stage for, reform proposals to bridge the gap between the normative framework and the system in practice.

#### **6.1.1 Discrepancies: Theory v. Practice**

The research has so far revealed a number of conflicts between theory and practice. These conflicts are most pronounced in the areas of protection of rights, the protective mandate of the Commission and Court especially in the areas of ratification (and declarations in the case of the Court), the promotional mandate of the Commission, and the implementation of the institutions' recommendations and judgments. This chapter is dedicated to interpreting and understanding discrepancies in the former (protection of rights by states) while the latter areas will be covered at length in the next chapter.

Chapter 4 of the thesis examined and established the level of protection of the subdivisions of rights in the Charter,<sup>1</sup> namely, civil and political rights, socio-economic rights, peoples' rights, and women's rights. In interpreting and assessing discrepancies in practice, rights will be grouped into negative rights and positive rights.<sup>2</sup> Civil and political rights will largely fall under the former while socio-economic rights will be discussed under positive rights. People's and women's rights share negative and positive

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<sup>1</sup> Including its Protocol on women's rights.

<sup>2</sup> This classification adopts the basic definition of negative rights as those that oblige inaction and positive rights as those that oblige action.

duties and will be subsumed under the two classifications. As specific violations of these rights have already been set out in Chapter 4, this chapter focuses more on interpreting these violations while highlighting a few case studies.

## **6.2 Protection of Negative Rights**

In Chapter 4, it was concluded, after a thorough analysis of State Reports, Concluding Observations and NGO and Rapporteur reports, that there were serious lapses in the observance of negative rights. These violations persisted despite clear provisions of the states' laws except in a few instances where local laws allowed for their perpetuation. Both of these instances are examined below.

### **6.2.1 Violations of Charter and National Provisions**

It was found that many violations subsisted despite Charter provisions and even domestic laws. The Special Rapporteur and NGO reports found several cases of harassment of human rights defenders (HRDs), violations of women's rights, rights of prisoners and refugee rights. While some of these actions were backed by national laws, many of them like the shooting of protesters and assassination of HRDs, were in flagrant violation of both regional and domestic laws.<sup>3</sup> Similar findings were made by the Commission in its Concluding Observations on State Reports. For instance, Nigeria had been reprimanded by the Commission for its use of torture and extrajudicial killings even though both practices were indefensible under Nigerian law.<sup>4</sup> The Human Rights Watch had also raised similar concerns about arbitrary arrests, torture, and extrajudicial killings.<sup>5</sup> Such was the gravity of these concerns that the Associated Press reported that, in one single month (June) of 2013, the Nigerian Army delivered 1795 bodies to a single

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<sup>3</sup> See Chapter 4.

<sup>4</sup> Federal Republic of Nigeria, Nigeria's 5th Periodic Country Report 2011-2014 on the Implementation of the African Charter on Human and Peoples' Rights in Nigeria (June 2014) <[http://www.achpr.org/files/sessions/56th/state-reports/5th-2011-2014/staterep5\\_nigeria\\_2013\\_eng.pdf](http://www.achpr.org/files/sessions/56th/state-reports/5th-2011-2014/staterep5_nigeria_2013_eng.pdf)> accessed 15 September 2015.

<sup>5</sup> Human Rights Watch, *World Report 2014: Nigeria* <http://www.hrw.org/world-report/2014/country-chapters/nigeria> accessed 13 November 2014.

mortuary in Maiduguri, in its bid to flush out the militant group Boko Haram.<sup>6</sup> In Uganda, the Commission's Concluding Observations recorded a prevalence of police brutality.<sup>7</sup> In Cameroon, the government still maintained the death penalty despite the observation of a de facto moratorium since 1997. In Sudan, the practice of female genital mutilation and the recruitment of child soldiers remained prevalent despite restrictive national laws.<sup>8</sup>

### *Interpretation and Implication*

The essence of immanent critique is to assess a state or people by their own standards. Thus, where there is a contrast between theory and practice such a state or people will be adjudged to have failed based on their own standards. Challenges could, of course, arise where there are different views on what the local standard is or in the general acceptance of such a standard, or even in the existence of pockets of variations of that standard and degrees of acceptance. Such instances will be examined in the section on violations aided by national laws. It is however a different case, in one such as this, where the regional norms are accepted and reinforced at the national domestic levels. In the face of such domestic legal and normative structures, the prevalence and perpetuation of violations raise a number of critical questions mainly the question of what is the cause of such discrepancies. In addressing this question this research adopts the rarely utilised approach of examining the various reasons adduced by states themselves in their various country reports. Many of these reasons have already been established in Chapter 4 and will be further expounded in this chapter. An examination

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<sup>6</sup>Michelle Faul, 'Nigeria's Military Killing Thousands of Detainees' Associated Press (Lagos, 18 October 2013)

<sup>7</sup> African Commission, Concluding Observations of the African Court on Human and Peoples' Rights on the 4th Periodic Report of the Republic of Uganda (2011) para 15 <[http://www.achpr.org/files/sessions/49th/conc-obs/4th-2008-2010/achpr49\\_conc\\_staterep4\\_uganda\\_2011\\_eng.pdf](http://www.achpr.org/files/sessions/49th/conc-obs/4th-2008-2010/achpr49_conc_staterep4_uganda_2011_eng.pdf)> accessed 16 November 2015

<sup>8</sup> For instance, the Sudanese government through the Sudanese Medical Board, issued a decision prohibiting doctors from carrying out female circumcision. See Republic of Sudan, The 4th and 5th Periodic Reports of the Republic of the Republic of the Sudan in accordance with article 62 of the African Charter on Human and Peoples Rights 2008-2012 (2013) para 237 <[http://www.achpr.org/files/sessions/51st/state-reports/4thand5th-2008-2012/staterep4and5\\_sudan\\_2012\\_eng.pdf](http://www.achpr.org/files/sessions/51st/state-reports/4thand5th-2008-2012/staterep4and5_sudan_2012_eng.pdf)> accessed 14 October 2015.

of these reasons is important because it ensures a high level of authenticity and certainty of the problems encountered by states. Given that these reasons emanate from the states themselves, the research avoids the pitfall of basing most of its analyses on assumptions which, no matter how intelligently conjured cannot replace direct information from the relevant sources.

### **6.2.2 Reasons Adduced by States for the Violation of Rights**

A study of the State Reports<sup>9</sup> reveal the following as the main challenges to implementing negative rights as identified by these states: Lack of financial and human resources (which is arguably a matter of capacity building), culture and traditional practices, Illiteracy and lack of knowledge. These are discussed below.

#### *Lack of Financial and Human Resources*

This is the most cited challenge, by states, to the implementation of the rights and standards of the Charter. Member states strongly make the case that they lack the financial, human and other resources to effectively guarantee and implement rights. As a result, many institutions and machinery created to implement these rights are usually underfunded and understaffed thereby limiting their impact and leaving room for unaddressed violations. In its report, Malawi identified ‘the lack of resources and capacity’ as its chief challenge in implementing the rights guaranteed under the Charter.<sup>10</sup> This lack of resources was felt in such key institutions of justice as the Police Force, Office of the Directorate of Public Prosecutions (DPP), and the office of the Ombudsman. For instance, the police to population ratio was as low as 1: 6,455 in rural areas, making such areas very difficult to police. The absence of such an important organ like the police in these areas invariably translates into poor protection of vital rights to

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<sup>9</sup> The studied State Reports are those of the five states seen in the previous chapter (Uganda, Nigeria, Sudan, Cameroon, and Malawi) and two additional states with up to date reports (Ethiopia and Kenya).

<sup>10</sup> Republic of Malawi, Report to the African Commission on Human and Peoples’ Rights: Implementation of the African Charter on Human and Peoples Rights 1995-2013 and the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women 2005-2013 (2014) para 44 [http://www.achpr.org/files/sessions/56th/state-reports/1-1995-2013/malawi\\_state\\_report\\_eng.pdf](http://www.achpr.org/files/sessions/56th/state-reports/1-1995-2013/malawi_state_report_eng.pdf) accessed 15 September 2015.

life and property. Furthermore, the office of the DPP had offices in only three major cities making the supervision of police prosecutors in several other locations difficult thereby compromising the right to a fair trial. The lack of decentralised grassroots structures was also a challenge for the office of the Ombudsman as it meant that many local indigenes did not have access to this body. Other factors that affected the performance of the Ombudsman include inadequate staff and funding, obsolete equipment and a huge backlog of cases due to absences and unavailability of the Ombudsman.<sup>11</sup> On the whole, the government stated that the criminal justice system was overwhelmed such that even serious crimes like homicide took a long time to finalise thereby compromising the right to a fair trial. This situation was attributed almost entirely to the lack of human resource capacity<sup>12</sup> and a large staff turnover.<sup>13</sup>

The situation appears even direr in Nigeria where there was a high level of ‘awaiting trial prisoners’ in the system, a situation that seriously compromised the right to a fair trial. The country’s report stated that of 47,508 prisoners in custody, 30629 were awaiting trial, some for more than 17 years.<sup>14</sup> A similar situation of backlog of cases was reported by the Ugandan government.<sup>15</sup> The Sudanese government also highlighted the lack of financial and human resources, a huge chunk of these having been previously deployed towards restoring security and order in the aftermath of heavy armed conflicts.<sup>16</sup> After cessation of conflicts, establishment and maintenance of peace required a huge amount of resources resulting in deficits in the country’s budgets.<sup>17</sup>

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<sup>11</sup> *ibid* para 29.

<sup>12</sup> *ibid* para 78.

<sup>13</sup> *ibid* para 139.

<sup>14</sup> Republic of Nigeria, *4<sup>th</sup> Periodic Country Report on the Implementation of the African Charter on Human and Peoples’ Rights in Nigeria* (2011) 36 [http://www.achpr.org/files/sessions/50th/state-reports/4th-2008-2010/staterep4\\_nigeria\\_2011\\_eng.pdf](http://www.achpr.org/files/sessions/50th/state-reports/4th-2008-2010/staterep4_nigeria_2011_eng.pdf) accessed 3 October 2015.

<sup>15</sup> Republic of Uganda, *5th Periodic Report by the Government of the Republic of Uganda to the African Commission on Human and Peoples’ Rights* (2013) 32 <[http://www.achpr.org/files/sessions/56th/state-reports/5-2010-2012/uganda\\_state\\_report\\_eng.pdf](http://www.achpr.org/files/sessions/56th/state-reports/5-2010-2012/uganda_state_report_eng.pdf)> accessed 24 October 2015.

<sup>16</sup> Republic of Sudan (n 8) para 312.

<sup>17</sup> *ibid* para 314.

These assertions and complaints by the states are supported by independent research. For instance, in an earlier study of 10 African countries, it was found that the judicial systems of all the countries studied suffered from 'a lack of resources across the board'.<sup>18</sup> Materials and equipment such as typewriters and stationery were lacking, court dockets were crowded, courtroom facilities were inadequate, delays were frequent, and there was a general lack of access to case reporters and other sources of legal precedent necessary for adequate judicial performance. Access to the legal system was challenging especially for poor and rural dwellers as lawyers were expensive and literally beyond the reach of most potential litigants. Public defenders, when they existed, were only available for criminal defendants in serious cases.<sup>19</sup>

It is interesting to note that in the decade after these findings were made, these challenges still exist and are routinely cited by states as inhibiting protection of rights. This shows the important connection between the economic situation of states and their ability to protect human rights. While acknowledging this connection, it should be clear that proposing economic solutions is outside the purview of this research. Of course, should it be found that states are willing, in all cases, to apply the stated norms but are restrained solely by the lack of financial and other resources, immanent critique would in such case, lose some of its potency at least to the extent of interpreting discrepancies and suggesting policy reforms. However, as will be seen in further sections, there are other important causes of poor implementation that go to the root of the Charter and its institutions.

### *Culture and Traditional Practices*

Another major challenge to the implementation and enforcement of civil and political rights is the existence of entrenched customary practices that are inimical to the practice of human rights. Such practices include the practice of female genital cutting, disinheritance of women, and widowhood rights. So ingrained are some of these

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<sup>18</sup> Abdullahi An-Na'im, Human Rights under African Constitutions (UPP 2003) 23.

<sup>19</sup> Ibid.



customs that the existence of regional and national laws do little to affect their application. For instance, the Malawian government reported that it faced challenges in ensuring equality of rights and responsibilities within the marriage set up. This was due to cultural practices that favoured men over women such as where a woman was forced to marry her brother-in-law upon the death of her husband or where a male child was awarded academic sponsorship and the female child made to stay at home.<sup>20</sup> The situation was similar in Nigeria. Here, the government reported that, despite signing to 'an array of international human rights instruments' affirming women's rights, there were other 'laws reflecting aspirations in direct variance to what these international instruments espouse.'<sup>21</sup> These were in the form of customary laws that provided institutional support for practices such as early marriages, early and 'unspaced' childbearing, female genital mutilation, widowhood rites and laws that exclude women from inheritance. The government went on to state that even where statutory laws outlawed some of these practices, evidence abounded to show that the enforcement level of these laws was 'negligible'.<sup>22</sup> This challenge of enforcing or monitoring violations in such regions was further demonstrated in the Ugandan report. The government stated therein that it was particularly challenging for the Police to investigate and prosecute cases of mob justice as these often involved entire communities or villages.<sup>23</sup>

As is noticeable from the above examples, women and children (especially the female child) are often affected the most by these customs. For instance, traditional systems of tenure do not normally recognise women's rights to access land in their own right. They can only have rights of use through marriage or through their male children.<sup>24</sup> Thus, on the dissolution of the marriage, the woman would usually be dispossessed of the land and made to return to her people where she is treated as a minor dependent on other

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<sup>20</sup> Republic of Malawi (n 10) para 109.

<sup>21</sup> Republic of Nigeria (n 14) 30.

<sup>22</sup> Ibid.

<sup>23</sup> Republic of Uganda, Periodic Report by the Government of Uganda to the African Commission on Human and Peoples' Rights (2011) 27 [http://www.achpr.org/files/sessions/49th/state-reports/4th-2008-2010/periodic\\_report\\_2008\\_2012\\_eng.pdf](http://www.achpr.org/files/sessions/49th/state-reports/4th-2008-2010/periodic_report_2008_2012_eng.pdf) accessed 4 June 2016.

<sup>24</sup> Michelo Hansungule, *The African Charter on Human and Peoples' Rights: A Critical Review* (2000) 8 AYBIL 265, 325.

male relatives.<sup>25</sup> Even in many areas where some of these practices are not observed, the bureaucracy on land allocation is usually based on policies that favour men against women.<sup>26</sup> Thus most land registries in Africa would 'bear only the names of men spiced with a handful of women.'<sup>27</sup> While there have been steps to eradicate these practices through legislation and judicial pronouncements, some of these customs are still entrenched and widely practised. One question that arises is why these customs are still prevalent. An even more pressing question, in line with immanent critique, is what can be done to curb their practice? This is in keeping with one of the aims of immanent critique which is to make or set the stage for reform proposals based on the discrepancies between theory and practice. This task is undertaken in the section below.

### *Resolving the Culture Imbroglia*

A number of reasons can be adduced for the proliferation and entrenchment of varying customs across the continent some of which are inimical to the practice of human rights. One reason is that most of these cultures existed in native African societies and have survived notwithstanding drastic occurrences like colonialism and adoption of human rights norms. While it is not particularly within the scope of this chapter to investigate the reasons for their survival, it has been argued that customary law (being the legal application of customs) owes its continued existence to political, economic, and social features such as general and drastic instability due to civil war or insurrection in a country.<sup>28</sup> Another factor that has been identified is the weakness and inaccessibility of institutional resources for the legal protection of rights which have forced people into seeking alternative mechanisms for the adjudication of disputes.<sup>29</sup>

Given some of the above reasons for their continued existence, it may be ambitious to create a roadmap for the outright elimination of most of these practices. Rather, the

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<sup>25</sup> Ibid.

<sup>26</sup> Ibid 326.

<sup>27</sup> Ibid 325.

<sup>28</sup> Abdullahi An-Na'im (n 18).

<sup>29</sup> Ibid 24.

challenge is on how states can regulate their content and application in order to better protect and promote human rights.<sup>30</sup> This task, it is argued, is best carried out through direct and targeted promotion. This, of course, is not an opinion that stands in isolation but one that has been canvassed and demonstrated by a few commentators down the years. It has been shown that legal pronouncements alone are not sufficient and that merely proscribing harmful cultural practices does very little to curb them. Mubangizi identifies law as only one component of a multidisciplinary approach required to halt harmful practices like FGM. Civil society, government, and other role-players are needed to change perceptions and attitudes through the use of human rights education, human rights advocacy, legislative measures, and developing customary law to ensure compatibility.<sup>31</sup> He particularly applauds the techniques applied by the NGO group 'Tostan' which engages local communities through activities like theatre and role-playing such that members of the community reach a consensus themselves about how to deal with issues such as FGM. This has resulted in an FGM abandonment success rate of 77 percent.<sup>32</sup> Ibhawoh has similarly argued for an understanding of both the general nature of the tension between national human rights regimes and cultural traditions and the internal tensions between contending paradigms of cultural legitimacy. He advocates a constructive approach to promoting human rights by seeking ways of enhancing the supportive elements of culture while redressing the problematic elements in ways that are consistent with the cultural integrity of the tradition in question and the contending groups within it.<sup>33</sup> Thus, the interplay between national human rights standards on the one hand and local cultural orientations on the other should be a dynamic process of give and take, ideally through persuasion and dialogue, with legislation serving only to complement the process. This system of cross-fertilisation, he argues, would narrow the gap between national human rights provisions

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<sup>30</sup> *ibid* 25.

<sup>31</sup> John Mubangizi, 'A South African Perspective on the Clash between Culture and Human Rights, with Particular Reference to Gender-Related Cultural Practices and Traditions' (2012) 13(3) *JLWS* 33.

<sup>32</sup> Nina Lakhani, 'Victory in sight for revolution over female genital mutilation' (2012) cited in John Mubangizi (n 31).

<sup>33</sup> Bonny Ibhawoh, 'Between culture and constitution: Evaluating the cultural legitimacy of human rights in the African State' (2000) 22(3) *HRQ* 838, 859.

and cultural orientations. More so, constitutional rights can derive their legitimacy not only from state authority but also from the force of cultural traditions.<sup>34</sup>

Like Mubangizi, Ibhawoh uses the FGM example to drive home his point. He points out that, as with most other customary practices, legislation has only been effective, in the case of FGM, where it has been integrated into other aspects of a comprehensive eradication strategy. He states that in several African countries where FGM legislation exists, it is not enforced for fear of alienating certain power bases or exacerbating tensions between practising and non-practising communities. He states:

No African country that has banned FGM, including Senegal, Egypt, Ghana and Burkina Faso, dares enforce the law. In Guinea, FGM carries the death penalty but it has never been applied. Early attempts to enforce legislation against FGM in Sudan caused such popular outcries that enforcement was subsequently abandoned. In Burkina Faso... it has become clear that criminalising practitioners and families has only succeeded in driving the practice underground and creating an obstacle to outreach and education... [In] order for legislation to be effective it must be accompanied by a broad and inclusive strategy for community-based education and awareness raising.<sup>35</sup>

The above portrayal necessarily invokes concerns on the foothold of normative human rights standards in these communities. It is also important for immanent critique as it is a demonstration of an instance when a peoples' actions go against their own standards. The situation is even trickier in this instance as customs also originate from the people. However, as has been canvassed in the first chapter, the African Charter is the adopted regional representation of the peoples' standards and necessarily supersedes other pockets of contrary practices. The continent's human rights practice could, therefore, fail the immanent critique test were it shown that harmful customary practices inimical to the Charter are prevalent and even more popular than the standards espoused in the Charter. It is argued, however, that this is not the case given the general acceptance of the Charter and the fact that these practices are mostly outlawed by national laws.

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<sup>34</sup> Ibid.

<sup>35</sup> ibid 857.

However, as has been shown in states reports and articles, statutes alone may not be sufficient to halt some of these practices. Much in the spirit of immanent critique, it has been opined that a viable way forward is through integrative programmes that involve local communities 'as changes in cultural attitudes and orientations can only be meaningful and sustainable if they come from within these local communities.'<sup>36</sup> Ibhawoh gives an example of how this has worked with regard to FGM in Kenya:<sup>37</sup>

'[In Kenya] some local communities have successfully introduced 'alternative circumcision rites' to replace old traditions. Under the new procedure arrived at through communal dialogue and consensus, the people within these communities agreed to do away with the physical mutilation of the woman's body during the traditional female circumcision rites while retaining other harmless aspects of the circumcision rites... During the celebrations...the adolescent girls are taught the basic concepts of sexual and reproductive health and are counselled on gender issues and other customary norms. As a way of legitimising the new procedure, the girls receive certificates certifying that they have undergone the traditional rites into womanhood. These innovations have produced hopeful results where previous efforts have failed. In one of the communities where the alternative circumcision rites were introduced and where about 95 percent of the girls previously had to undergo circumcision, the rate of FGM is estimated to have gone down to 70 percent.'

It is clear from the above that different actors have varying roles to play in curtailing harmful cultural practices. The courts, for instance, have to refuse to recognise customs that are repugnant to justice, equity, and good conscience,<sup>38</sup> while the legislature passes laws that reform obnoxious customary law.<sup>39</sup> However, it has been noted that reversing particular cultural practices is difficult and akin to reversing social conventions thus necessitating a careful approach that not only promotes human rights but that is also respectful of the culture and values of particular communities.<sup>40</sup> It has been posited that 'outsiders' often view cultural practices from a very simplistic perspective without

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<sup>36</sup> *ibid* 857-858.

<sup>37</sup> *ibid* 858.

<sup>38</sup> Most African legislations allow the observance of customs as long as they do not violate national laws and are not 'repugnant to justice, equity and good conscience'.

<sup>39</sup> See Mubangizi (n 31).

<sup>40</sup> Mackie and others, 'Social Dynamics of Abandonment of Harmful Practices: A New Look at the Theory' (2009) cited in Mubangizi (n 31).

appreciating the complexities and meanings of the practices, and the differing and sometimes conflicting responses to them.<sup>41</sup> Such observation demands that care is taken not only in the approach to legal enactments and interpretations but also in the formulation of administrative policies.

In summary, therefore, it is posited that the challenge of obtrusive cultures cannot be solved solely through legislative means but through a fusion of soundly formulated and applied promotional measures as in the examples cited above. Such promotions require the concerted efforts of states, NGOs and the Commission alike. Applied side by side with promotional measures should be positive protective steps, for example criminal prosecution, as provided in the national laws. Thus, while the promotional measures are aimed at instilling the standards in the people thereby restraining them from violating human rights, the protective measures are aimed at protecting and providing remedies to those persons whose rights have been infringed.

#### *Illiteracy and Ignorance of Rights*

Another factor that has been highlighted by states is the ignorance, on the part of the citizens, of rights and how to enforce them. Malawi pointed to a general lack of public awareness especially by vulnerable groups, of their rights and how to exercise them.<sup>42</sup> Thus, even though there were some existing institutions for the protection of these rights, a proportion of the populace either had no knowledge of these or how to use them. The Malawian government gave the example of the Ombudsman of which the general public, and even the respondents, had little knowledge either of its functions or mode of operation.<sup>43</sup> Like Malawi, Nigeria<sup>44</sup> and Uganda have also identified illiteracy and ignorance as major challenges to the practice and implementation of human rights. In the latter's case, the government states that civic education of the masses before,

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<sup>41</sup> Mubangizi (n 31) 45.

<sup>42</sup> Malawi (n 10) para 140.

<sup>43</sup> *ibid* para 29.

<sup>44</sup> Nigeria (n 4) 62.

during and after elections continue to pose a challenge.<sup>45</sup> This need to educate is not limited to the masses but also extends to institutions tasked with protecting human rights. For instance, Malawi has noted that the 'main challenge' in terms of ensuring public peace has been the 'capacity and independence of the police.' It goes on to state that there have been cases of violation of rights by the police in the process of maintaining national peace. Thus, the police have, for instance, shot at unarmed civilians in the process of dispersing demonstrations.<sup>46</sup> Such actions invariably infringed on such rights as the right to life and freedom of assembly.

The ignorance and sometimes sheer disregard for human rights by the police has led some states to incorporate human rights into their local police training. One example is Cameroon which reported that, to ensure the protection of rights and minimise abuse, the government had included human rights training in the programme of the Cameroonian national gendarmerie, with some security personnel even trained in human rights at the Masters level.<sup>47</sup>

There is no doubt that, for better protection of rights, the likely victims, or those close to them, need to be aware of the existence of these rights and the duty of the state to protect them. This is because they are the ones who would have to bring complaints against the state. The level of protection would be negatively impacted where such persons are ignorant of their rights or misconstrue them as privileges. This essentially means that improving human rights protection requires an empowered citizenry. It should also be pointed out that states have a duty under the Charter to educate the people on their rights and to see to it that these rights are understood.<sup>48</sup>

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<sup>45</sup> Uganda, 5<sup>th</sup> Periodic Report (n 15) 27.

<sup>46</sup> Malawi (n 10) para 126.

<sup>47</sup> Republic of Cameroon, 3rd Periodic Report of Cameroon within the Framework of the African Charter on Human and Peoples' Rights (2013) para 90 and 91 <[http://www.achpr.org/files/sessions/54th/state-reports/3-2008-2011/staterep3\\_cameroon\\_2013\\_eng.pdf](http://www.achpr.org/files/sessions/54th/state-reports/3-2008-2011/staterep3_cameroon_2013_eng.pdf)> accessed 13 October 2015.

<sup>48</sup> Art 25.

It is again clear from the above that targeted promotional measures are needed to better educate and enlighten general populations on their rights and how to protect them. This is not to say that some of such measures are not already in place. Governments, civil society, and the Commission have, over the years, initiated measures aimed at educating the various strata of the society, including public organs and local populations, on human rights. It has been observed that while the government concentrated its efforts on the development of school curricula, the training of officials was left to NGOs.<sup>49</sup> There was also the subsequent increase in the number of national human rights commissions which became the 'main role players' in human rights education.<sup>50</sup> However, much like the conclusion on the state of human rights in Africa, the issue is not whether there are some measures in place<sup>51</sup> or even a few success stories but whether the entire system of promotion and education has been implemented to such a level as to be adjudged to have objectively met the needs and standards of the continent. This has clearly not been the case. To resolve this challenge of ignorance (and even to some extent the cultural challenges), such promotional measures have to be proportional to the level of awareness, or lack thereof, of human rights in the continent. This necessarily entails a concerted effort by the key players, the national systems (including governments and national human rights commissions), regional system and civil society, towards the promotion of rights and education of local populations based on a viable Plan of Action. It should, however, be stressed that, while such plans may go a long way in setting the stage for improvements, other factors exist which could thwart or frustrate them. The research will demonstrate this in the next chapter's discussions on the challenges to the promotional mandate of the Commission.

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<sup>49</sup> S Cardenas, 'Constructing rights? Human rights education and the State' (2005) 26(4) IPSR 363, 368.

<sup>50</sup> Ibid.

<sup>51</sup> One such measure is the African Human Rights Education which is a four-year programme developed by Amnesty International to promote human rights through education in 10 African nations: Benin, Burkina Faso, Cote d'Ivoire, Ghana, Kenya, Mali, Senegal, Sierra Leone, Togo and Uganda. See The East and Horn of Africa Human Rights Defenders Project < <https://www.defenddefenders.org/african-human-rights-education-project/> accessed 21 July 2016.



### 6.2.3 Violations Aided by National Laws

While factors such as lack of resources, cultural leanings, and illiteracy can adversely affect the implementation of rights guaranteed in the African Charter by otherwise willing states, there are however many instances of states' unwillingness to implement these rights and even taking positive steps to truncate or undermine them.<sup>52</sup> In some instances, national laws were passed which directly restricted or jeopardised the enjoyment of some rights, for instance, Sudan's National Security Act 2010 which allowed security officials to detain suspects for up to four and a half months before being charged as well as granting security officials immunity from criminal and civil procedures for acts connected with their official work. Most of such restrictive statutes were in the areas of press freedom and the freedom of association.<sup>53</sup> Another area of dissonance was in the application of the death penalty,<sup>54</sup> even though here it was argued that until member states signed a Protocol abolishing same, they could not be held in violation as the Charter does not expressly prohibit the death penalty.

The wilful or careless violation by states of their human rights responsibilities raises serious implications from the perspective of immanent critique as such actions show a flagrant disregard for the established normative standards. The pertinent question at this stage is why a state that participated in drafting, signing, ratifying and even domesticating a treaty would turn around to systematically violate it. It is in resolving this question that possible solutions can emerge for addressing the problem. This section will briefly examine two cases of such positive systematic violations with a view to ascertaining the underlying causes and adduced reasons for those violations. These cases are Zimbabwe's controversial land reforms that led to the disbanding of the Southern African Development Community (SADC) Tribunal, and Sudan's National Security Act.

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<sup>52</sup> These have been examined in Chapter 4. See, especially, sections on NGO statements, Special Rapporteur reports, and Concluding Observations of the Commission.

<sup>53</sup> See analysis of special rapporteur reports in Chapter 4.

<sup>54</sup> See Chapter 4.

### *Zimbabwe's Land Reform Programme*

The controversial contents of this programme were contested in the case of *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* where the applicants challenged the compulsory acquisition of their agricultural lands under the land reform programme of the Zimbabwean government. Such acquired land vested full title in the state without compensation to the dispossessed party, except for improvements effected on the land before it was acquired. Also, a person whose land had been acquired was barred from challenging its acquisition in a court of law with the courts also expressly prevented from hearing such matters.<sup>55</sup> These provisions immediately raise serious human rights concerns. The first is the issue of fair hearing; the second more subtle concern is the freedom from discrimination. While not obvious from the provisions, the implementation of Zimbabwe's land reforms necessarily involved dispossessing white farmers of land appropriated to them during the country's colonial years. On the right to fair hearing and access to the courts, the SADC Tribunal held that the constitutional provision ousting the court's jurisdiction infringed on the right to the protection of the law and to a fair hearing. In reaching this decision, the Tribunal referred, *inter alia*, to the decision of the African Commission in the case of *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*<sup>56</sup> which concerned ouster clauses preventing Nigerian courts from hearing cases brought by publishers contesting the search and seizure of their premises. The Commission held, in that case, that such a practice would result in a legal situation where the judiciary could no longer provide a check on the executive branch of the government, a situation which was inimical to constitutional democracy.<sup>57</sup> On the issue of discrimination, the Tribunal concluded that even though there was no express mention of race, the effect of Amendment 17 was such that it would be felt almost exclusively by white farmers and was, therefore, discriminatory.<sup>58</sup>

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<sup>55</sup> Section 16 of Amendment 17 of the Constitution of Zimbabwe 2005.

<sup>56</sup> Communication no 140/ 94, 141/ 94, 145/ 95 (1999).

<sup>57</sup> Precious Ndlovu, 'Campbell v Republic of Zimbabwe: A moment of truth for the SADC Tribunal' (2011) 1 SADCLJ 63, 72.

<sup>58</sup> *ibid* 73.

Given the weight of the issues raised and the findings by the Tribunal, one wonders why Zimbabwe, a signatory to the Charter and other human rights treaties, would enact such a provision into law. To determine this, one needs to understand the history of the country and its land reforms as well as the stated reasons for such a law. While the rationale for such a law would not vitiate its status as violating human rights, it is, for the purposes of immanent critique, important in interpreting the discrepancy and proffering possible policy directions.

#### *Understanding Zimbabwe's Violation*

Zimbabwe's land reform measures were instituted to address perceived problems of injustice and discrimination against the local populace by European colonial settlers. During the country's colonial years, discriminatory agricultural policies and the alienation of most of the fertile, well-watered land to European settlers resulted in the oppression, marginalisation, and impoverishment of indigenous people.<sup>59</sup> In 1930, an enforced racial division of land saw the country's land divided roughly equally between the African majority and a few European settlers constituting less than 5% of the total population.<sup>60</sup> It was in an effort to redress these inequities that the government introduced a series of agrarian reform measures after independence and beyond. These reforms included a constitutional amendment and modified Land Acquisition Act promulgated in April 2000 to effect land designation and compulsory acquisition without compensation.<sup>61</sup>

In its response to the above claim filed before the Tribunal, the government stated that the fact that the lands acquired belonged to white farmers had to be attributed to the country's colonial history, which had seen the majority of fertile land allotted to those farmers. Thus, the land reform was to be seen as a legitimate means to achieving an

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<sup>59</sup> Bill Kinsey, 'Zimbabwe's Land Reform Program: Underinvestment in Post-Conflict Transformation' (2004) 32(10) WD 1669.

<sup>60</sup> *ibid* 1671.

<sup>61</sup> *ibid* 1669.

equally legitimate end which was to correct colonial land imbalances.<sup>62</sup> Here, one notices the intent behind the law which was to tackle economic and social imbalances in the system.

It is no doubt the case that many governments, even where their policies are repressive, believe that there is some justification for those policies. It would, however, defeat the purpose of human rights and the rule of law to shield such governments from accountability by silencing the national judiciary and other external tribunals. At the most basic level, human rights are essentially protection from the state with such protection to be offered through the process of adjudication when an individual perceives that his or her rights have been infringed. It is therefore not difficult to agree with the Tribunal's finding in this case. Interestingly, this is not an isolated occurrence. Ouster clauses have already been seen in the Nigerian case above<sup>63</sup> as well as the Zimbabwean case of *Zimbabwe Human Rights NGO Forum v Zimbabwe*,<sup>64</sup> and while there may be some perceived 'good' intention behind these clauses and the policies they protect, they only reveal a fear of accountability and dictatorial tendencies, and even more seriously, a lack of commitment to the protection of human rights. The subsequent disbandment of the SADC Tribunal further strengthens the second-place status of human rights in the African political context.<sup>65</sup>

#### *Sudan's NSA and Gagging of the Press*

One major area of concern for the Commission<sup>66</sup> was Sudan's National Security Act 2010. This Act allows security officials to detain suspects for up to four and a half months without judicial review before charges are levied. It also provides members of the National Intelligence and Security Service (NISS) and their associates with immunity

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<sup>62</sup> Precious Ndlovu (n 57) 68.

<sup>63</sup> See n 56.

<sup>64</sup> Communication 245/2002.

<sup>65</sup> After the finding in this case, Zimbabwe pulled out of the Tribunal's jurisdiction leading to a review of its jurisdictions. The Court was subsequently disbanded. In 2012, it was decided that it would only hear matters between states with the doors closed to individual complaints.

<sup>66</sup> See Chapter 4.

from criminal and civil procedures for acts connected with the official work of the member. This has been the basis for arbitrary arrests and incommunicado detentions.

Amnesty International has detailed what appears to be a crackdown on independent media and civil society in the run-up to the general elections in 2015. The NISS reportedly confiscated publications from at least 16 newspapers on 42 different occasions and interrogated about 21 journalists.<sup>67</sup> These actions were obviously sanctioned by Sudan's national laws and even exacerbated by more recent constitutional amendments passed by Parliament which gave unlimited discretion to the NISS to interfere in political, economic and social issues.<sup>68</sup> There have been other similar reports of pre-print censorship despite constitutional guarantees of freedom of expression and the media.<sup>69</sup> As in Zimbabwe's case above, the issue that arises for determination is the motive behind these laws and their general implication.

#### *Understanding Sudan's violations*

Sudan's human rights records should be seen in the context of a nation only emerging from the bitter experience of a brutal and protracted civil war. For a country embroiled in over two decades of civil war, such practices as systematic torture of individuals, often at the hand of the NISS, was already commonplace.<sup>70</sup> Such was the practice of this war-torn country that changing its national security law was at the heart of reforms envisaged in the 2005 Comprehensive Peace Agreement<sup>71</sup> between the two warring

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<sup>67</sup> Amnesty International, *Sudan: Entrenched repression: Freedom of Expression and Association under Unprecedented Attack* (2015) <<https://www.amnesty.ch/de/laender/afrika/sudan/dok/2015/sudan-zunahme-der-repression-vor-den-wahlen/amnesty-bericht-entrenched-repression-freedom-of-expression-association-under-unprecedented-attack>> accessed 06 February 2016.

<sup>68</sup> Ibid.

<sup>69</sup> For instance, in 2006 the Sudan Organisation against Torture drew attention to instances of censorship of the media. See Sunday Tribune, Human Rights Alert (2006) <http://www.sudantribune.com/spip.php?article17559>, accessed 06 February 2016.

<sup>70</sup> Lutz Oette, 'In Bad Company: South Sudan's Proposed New Security' Sudan Tribune (Sudan 6 October, 2014) <<http://www.sudantribune.com/spip.php?article52644>> accessed 6 February 2016

<sup>71</sup> The Comprehensive Peace Agreement between the Government of the Republic of the Sudan and The Sudan People's Liberation Movement/Sudan People's Liberation Army 2005, <http://www.refworld.org/docid/4c0377872.html> accessed 15 March 2017.

sides. According to this agreement and Sudan's 2005 Interim National Constitution,<sup>72</sup> the existing security laws were to be radically changed with the NISS transformed into an intelligence service. However, the Sudanese government delayed these reforms only to present a new security bill in 2009 which effectively retained NISS powers and immunity from accountability. This action triggered widespread opposition by local and international observers.<sup>73</sup>

Amnesty International attributes the emergence of the Act to events following the 2008 attack by Chadian armed opposition groups on N'Djamena, the capital of Chad. A number of Sudanese newspapers had reported that the Sudanese government had supported the attack to overthrow the President of Chad. In reaction to these reports, the government ordered a clampdown on the press through the reintroduction of pre-print censorship and the resumption of daily visits to printing houses and newspapers by the NISS. After a failed attack on Sudan's capital, Khartoum, by an armed opposition group, more than 1000 individuals were arrested mainly by the NISS and 106 death penalties pronounced in under 2 years.<sup>74</sup>

The essence of the above narrative is to understand the state of affairs in Sudan and its impact on the development of legal enactments affecting human rights. It appears that the volatile and conflict-ridden state of the country has driven its leaders, who in any case are not particularly known for human rights observance, to implement draconian and unsavoury policies. One may argue whether, given its peculiar situation of civil conflicts and unrest, Sudan is not permitted to derogate from the provisions of the Charter. However, the Charter does not contain a derogation clause and the Commission has interpreted this to mean that the Charter does not permit derogations.<sup>75</sup> Moreover, a peace agreement has been signed since 2005, and even though there may be occasional pockets of violence, these cannot justify a perpetual derogation.

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<sup>72</sup> The Interim National Constitution of the Republic of the Sudan, 2005.

<sup>73</sup> Ibid.

<sup>74</sup> Amnesty International, *Agents of Fear: the National Security Service in Sudan* (Amnesty International, London, 2010).

<sup>75</sup> *Commission Nationale des Droits de l'Homme et des libertes v. Chad*, Communication 74/92.

Infringements by the NISS are also systematic and lack the necessary ingredients of urgency and emergency that characterise such derogations under international law. While it may be necessary to take further steps in the aftermath of an event like the armed attack on Khartoum, it is hard to justify pre-print censorship which effectively gags the press and restricts freedom of expression. Far from seeing any justifiable reason for Sudan's dictatorial poise, Amnesty International believes that the NSA 2010 embodies the government's vision of a national security force whose function is to maintain it in power.<sup>76</sup> This perceived tyranny is evidenced by the issuance of an arrest warrant against Sudan's President by the International Criminal Court for war crimes and crimes against humanity.

A number of conclusions can be drawn here. The first is that, given its protracted civil war, some human rights were routinely violated by the Sudanese government resulting in charges of war crimes and crimes against humanity against the country's President. Now, after the cessation of conflicts, the government has apparently retained the oppressive role of its security forces. Whether this is done to maintain the still fragile peace or to maintain the government in power is an issue for debate. The main point is that the Sudanese government has no legitimate excuse for its violations of the above-stated rights especially given that the war has ended. This is, therefore, one case that shows a clear disregard for the rights of the individual as contained in the African Charter of which Sudan is a signatory.

The above two case studies are instances where political and country-specific considerations have triumphed over the set standard. These political considerations, therefore, constitute a major source of discrepancy between the theory and practice of human rights. Incidentally, it was such situations as these that necessitated the creation of a regional human rights system in the first place, to curtail systematic and blatant violations by states. That these situations still exist means that mere signing and ratification of treaties do not necessarily induce compliance with the provisions of those

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<sup>76</sup> Amnesty International (n 74) 12.

treaties even in those instances where compliance is not hindered by the lack of resources. To resolve this issue, the subject of political will in the particular context of the African Charter needs to be addressed as well as the issue of accountability through the regional institutions. The former is examined in later parts of this chapter while the latter will be addressed in Chapter 7. In the meantime it is necessary, just as has been done with negative rights, to analyse the challenges confronting the protection of positive rights under the Charter.

### **6.3 Protection of Positive Rights**

...Convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.<sup>77</sup>

With the above words, the Charter set the basis for the importance and sanctity of socio-economic rights such as the right to work,<sup>78</sup> right to health<sup>79</sup> and right to education.<sup>80</sup> However, after a study of relevant reports and assessments in Chapter 4, it was found that these basic standards had generally not been met. While there were many efforts to ameliorate the poor state of living, all of the states examined acknowledged the persistent dismal state of health, education, and social services. Some of the major causes of these were the lack of human and financial resources, poverty, cultural influences, war and political instability. Each of these will be discussed briefly.

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<sup>77</sup> African Charter Preamble.

<sup>78</sup> Art 15.

<sup>79</sup> Art 16.

<sup>80</sup> Art 17.



### 6.3.1 Lack of Human and Financial Resources

Much like negative rights above, the implementation of socio-economic rights has been hindered by the lack of human and financial resources of many African states. Nigeria reports that the paucity of funds has affected the ability of mainline ministries and agencies responsible for the promotion of security, socio-economic welfare and poverty eradication programmes and projects to effectively implement most of the provisions of the economic, social, cultural, environmental and developmental rights guaranteed under the Charter.<sup>81</sup> For instance, the nation-wide Universal Basic Education Programme which sees over 20 million children attending more than 60,000 basic education schools has been severely affected by funding and implementation challenges leaving nearly 11 million children out of school.<sup>82</sup> Similarly, Uganda reports that there was limited funding for activities to implement the Charter requirements for both the health and education sectors. This challenge was worsened by the country's 'considerably high' birth rate as against its slowing economic growth rates.<sup>83</sup> Kenya pointed to its worsening economic performance as having 'a profound and negative impact on the overall welfare of the people.'<sup>84</sup> It stated, additionally, that the government lacked adequate infrastructure and financial resources to extend its free primary education programme to secondary and tertiary institutions.<sup>85</sup>

### 6.3.2 Large-scale Poverty

'Africa's trademark as a continent is punctuated by poverty, ignorance, diseases and a high level of underdevelopment not comparable to other continents.'<sup>86</sup>

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<sup>81</sup> Nigeria (n 4) 20.

<sup>82</sup> *ibid* 66. It is important to note, especially considering the particular example of the Universal Basic Education Programme, that corruption and mismanagement of resources may have important roles to play as highlighted in the discussed case of *SERAP v Federal Republic of Nigeria*.

<sup>83</sup> Uganda (n 15) 32.

<sup>84</sup> Republic of Kenya, Combined 8<sup>th</sup>-11<sup>th</sup> Periodic Report on the African Charter on Human & Peoples' Rights (2014) para 179 [http://www.achpr.org/files/sessions/57th/state-reports/8th-11th-2008-2014/kenya\\_state\\_report\\_eng.pdf](http://www.achpr.org/files/sessions/57th/state-reports/8th-11th-2008-2014/kenya_state_report_eng.pdf) accessed 12 January 2016.

<sup>85</sup> *Ibid*.

<sup>86</sup> Christopher Mbazira, 'Enforcing the economic, social and cultural rights in the African Charter on Human and Peoples' Rights: Twenty years of redundancy, progression and significant strides' (2006) 6 *AHRLJ* 333, 334.

Extreme poverty is undoubtedly one of the main causes of poor socio-economic standards. If a majority of the population of the target countries were able to sustain themselves, then the respective governments would have relatively fewer people to worry about. However, Africa as a region has been continually plagued with poverty. In 2012, 42.7% of Sub-Saharan Africa (comprising 48 countries and 800 million people) lived on less than \$1.90 a day.<sup>87</sup> In Liberia alone, the poverty headcount ratio stood at an alarming 89.6%, with Madagascar, Burkina-Faso, Democratic Republic of Congo and Malawi standing at 81.8%, 80.5%, 77.2%, and 70.9% respectively.<sup>88</sup> It is no surprise then that poverty has been described as ‘the greatest threat to and source of human rights violations in Africa.’<sup>89</sup> This challenge has unsurprisingly being echoed by states. For instance, Kenya has stated that, as 56% of its population (about 17 million people) lived below the poverty line, it has found it difficult to meet the needs of these people.<sup>90</sup> Malawi states that its poor rural dwellers being more concerned with daily sustenance, pay less attention to other socio-economic rights such as the right to education. This, the country states, has had a bearing on the literacy levels as some children, with the endorsement of their parents, drop out of school to seek jobs for sustenance.<sup>91</sup> Uganda reported static school enrolment and increasing drop-out rates due to ‘social, economic and cultural pressures’.<sup>92</sup> Similar reports were also made by Nigeria<sup>93</sup> and Ethiopia.<sup>94</sup>

### 6.3.3 Cultural and Religious Influences

While poverty and dwindling economic fortunes may be largely responsible for the poor implementation of socio-economic rights, other factors like culture and religion have

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<sup>87</sup> The World Bank, <http://data.worldbank.org/topic/poverty> accessed 12 January 2016.

<sup>88</sup> The World Bank, <http://povertydata.worldbank.org/poverty/region/SSA> accessed 12 January 2016.

<sup>89</sup> Frans Viljoen, *International human rights law in Africa* (OUP 2012) 481.

<sup>90</sup> Kenya (n 84) para 178.

<sup>91</sup> Malawi (n 10) para 138.

<sup>92</sup> Uganda (n 15) 27.

<sup>93</sup> Nigeria (n 4).

<sup>94</sup> Republic of Ethiopia, The Fifth and Sixth Periodic Country Report 2009-2013 on the Implementation of the African Charter On Human and Peoples’ Rights In Ethiopia (2014) < [http://www.achpr.org/files/sessions/56th/state-reports/5-2009-2013/ethiopia\\_state\\_rport\\_eng.pdf](http://www.achpr.org/files/sessions/56th/state-reports/5-2009-2013/ethiopia_state_rport_eng.pdf)> accessed 06 July 2016.

played an adverse role. In one instance, the Sudanese National Council for the Welfare of the Child faced challenges in ensuring child welfare when parents refused to vaccinate their children against a measles outbreak because of their religious beliefs.<sup>95</sup> In a similar vein, the Cameroonian government reported that its efforts to enrol children into school had been confronted with 'the challenge relating to people's regard for socio-cultural value linked traditions where educating the child in general, and the girl child in particular, is not considered as a priority.'<sup>96</sup> Much like negative rights above, one notices that it is vulnerable groups like women and children (particularly the female child) that are more prone to such cultural stigmatisation. Here again, the necessity of the additional instruments<sup>97</sup> to protect the rights of these groups is not left in doubt.

#### **6.3.4 Ignorance and Illiteracy**

Much like negative rights, the implementation of positive rights has been affected by ignorance of the protection of this subgroup of rights on the part of the populace. Ssenyonjo states that one contributory cause for the continued marginalisation of this category of rights is the lack of awareness of the Commission's jurisprudence on these rights.<sup>98</sup> Where the people do not appreciate the social and developmental obligations of the government, they cannot reasonably be expected to make complaints on those grounds despite the existence of supportive decisions and interpretations by the Commission. This is further evidenced by the poor use of the Commission's communications procedure in relation to socio-economic rights resulting in its slow jurisprudential development.<sup>99</sup>

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<sup>95</sup> Republic of Sudan, The 4th and 5th Periodic Reports of the Republic of the Sudan in accordance with art 62 of the African Charter on Human and Peoples Rights 2008-2012 (2013) para 83 <[http://www.achpr.org/files/sessions/51st/state-reports/4thand5th-2008-2012/staterep4and5\\_sudan\\_2012\\_eng.pdf](http://www.achpr.org/files/sessions/51st/state-reports/4thand5th-2008-2012/staterep4and5_sudan_2012_eng.pdf) accessed 14 October 2015.

<sup>96</sup> Cameroon (n 47) para 304.

<sup>97</sup> The Women's Protocol and the African Charter on the Right and Welfare of the Child.

<sup>98</sup> Manisuli Ssenyonjo, 'Analysing the Economic, Social and Cultural Rights Jurisprudence of the African Commission: 30 Years Since the Adoption of the African Charter (2011) 29(3) NQHR 358.

<sup>99</sup> Takele Soboka Bulto, 'The Utility of Cross-Cutting Rights in Enhancing Justiciability of Socio-Economic Rights in the African Charter on Human and Peoples' Rights' (2010) 29(2) UTLR 142, 162.

The general prevailing ignorance of human rights points to institutional failures both at the national and regional levels. While states have failed in their duty to educate the general populace on their human rights and how to enforce them,<sup>100</sup> the regional system through the Commission has also failed in its promotional duties.<sup>101</sup>

#### **6.4 Evaluation of the Charter's Content on Rights – Too ambitious?**

The preceding sections have examined the reasons proffered by states for the violation of Charter rights, or in many cases, the inability to stop these violations. Of these, lack of resources, cultural influences, and poverty take centre stage with the first being the most cited challenge. These identified challenges naturally raise questions on the Charter's content of rights. Thus, despite being appropriate and geared towards an egalitarian and cultured society,<sup>102</sup> are these espoused standards also suited to Africa's prevailing economic and political situation or are they perhaps too ambitious and demanding of the largely developing states? This question would seem, at first glance, to be directed to other categories of rights, for instance, socio-economic rights rather than civil and political rights. As the latter are principally negative rights which require the states to refrain from certain actions, it would naturally be assumed that they would not be impacted by economic and even political considerations. This is however not the case. The sections above have shown that weak institutions, occasioned by the lack of human and financial resources, are one of the major challenges identified by states for non-implementation of civil and political rights. As in the examples above, the inability to build courts and pay more judges would likely result in the prolonged detention of inmates without trial thereby violating their right to a fair trial including the provision to be charged to court within a reasonable time.<sup>103</sup> Lack of resources would also occasion the overcrowding of prisons and affect the right to human dignity—an often cited

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<sup>100</sup> See art 25

<sup>101</sup> See art 45(1)

<sup>102</sup> See Chapter 2

<sup>103</sup> See n 10, 11, and 12 above

challenge<sup>104</sup> for which the Commission has created the office of a special rapporteur.<sup>105</sup> Many similar instances could be mentioned including the inability to train the police force<sup>106</sup> or to site institutions in rural areas.<sup>107</sup> Thus, while these rights are generally of a negative nature they also impose a positive duty on the state to ensure their observance. It is in this area that states have mostly been found wanting.

On the converse side are socio-economic rights which, unlike in other instruments, have been accorded an enforceable status by the Charter.<sup>108</sup> Like negative civil and political rights, this subset of rights is affected by the lack of human and financial resources. While states have taken varied steps to improve health, education, and social services, these areas remain in deplorable states.<sup>109</sup> Given the poor implementation of the Charter rights and the inability of states to enforce them (in many cases), the question that arises is whether the normative standard is too ambitious thereby requiring that expectations be scaled down. This question will be addressed in relation to both negative and positive rights.

#### **6.4.1 Negative Rights**

Addressing the question whether the Charter's negative rights are too ambitious necessarily demands a knowledge of the content or substance of those rights. This exercise has already been undertaken at some length in Chapter 3. It was shown that the Charter mainly adopted basic civil and political rights as contained in the Universal Declaration and International Covenant on Civil Political Rights. Aside expanding some of the rights in further protection of women and the girl child, the Charter did not introduce any novel concept or approach to these negative rights. Interpreting these

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<sup>104</sup> See Chapter 4. The Commission has regularly raised the issue of prison congestion in its Concluding Observations.

<sup>105</sup> The office of the Special Rapporteur on Prisons and Conditions of Detention was created at the 20<sup>th</sup> Ordinary Session of the Commission. <http://www.achpr.org/mechanisms/prisons-and-conditions-of-detention/> accessed 14 January 2016

<sup>106</sup> See n 24 above

<sup>107</sup> See n 9 above

<sup>108</sup> See Chapter 3

<sup>109</sup> See Chapter 4

rights, therefore, as too ambitious and unattainable would be tantamount to putting forward the position that African countries are not expected to live up to or observe even the most basic first generation rights.

Without a doubt, the Charter as a whole was ambitious at its inception. It should be recalled that the Charter was necessitated as a result of gross human rights violations by a number of dictatorial African regimes. Efforts to draft a Charter were commenced in 1979 after three African governments,<sup>110</sup> known for their egregious violations of human rights, came to an end.<sup>111</sup> The then OAU felt the need for a continental human rights instrument to reinforce the human dignity and worth of Africans that had been utterly disregarded by these regimes as well as the apartheid regime of South Africa.<sup>112</sup> Given the number of military dictatorships and wanton violation of rights, the implementation of negative rights was no doubt expected to be a challenge. It was however hoped that the Charter, through its acceptance and adoption, would usher in a period of human rights observance and respect. Interestingly, as has been shown in the course of this research, most of the conditions that led to the creation of the Charter still exist. For instance, many African states are headed by long-serving and oppressive Heads-of-States under false appendages of democracy. Keen to maintain their grapple on power, these governments would characteristically limit the opposition by arresting dissenters and restricting the press.

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<sup>110</sup> The governments of Idi Amin of Uganda, Macias Nguema of Equatorial Guinea and Jean-Bodel Bokassa of the then Central African Empire.

<sup>111</sup> Kenneth Asamoah Acheampong, 'Reforming the Substance of the African Charter on Human and Peoples' Rights: Civil and Political Rights and Socio-Economic Rights' (2001) 2 AHRLJ 185

<sup>112</sup> *ibid*

In its 2014 Democracy Index, the Economist Intelligence Unit identified Mauritius as the only 'full democracy' <sup>113</sup> in Africa.<sup>114</sup> The majority of states were classed as authoritarian/nominal democracies while others were classed as hybrid or flawed democracies. Fourteen countries did not have Presidential term limits and nine countries had had the same leader for over 20 years.<sup>115</sup> There is no doubt that negative civil and political rights would be compromised in such political environments, even though, the State Reports have, for obvious reasons, not alluded to this. Sadly, therefore, despite improvements in many quarters as in the eradication of apartheid and democratic transitions of a few African states, the contents of the Charter on negative rights could arguably be regarded as ambitious even 30 years after the Charter's creation. This is further amplified by the above-stated challenges particularly the lack of human and financial resources.

This adopted position is supported by the assertion that the shortcomings of the African regional system are mostly practical and political matters to which treaties are, 'to put it bluntly, irrelevant'.<sup>116</sup> Odinkalu lists these practical and political matters as funding, absence of compliance and supportive political will on the part of the state parties, inadequate popular awareness about the system, and the management and administration of the Commission.<sup>117</sup> Each of these issues has been addressed in this and previous chapters. The issue of political will, however, has not been discussed in relation to observing Charter obligations. Earlier discussions<sup>118</sup> examined this issue in relation to the implementation of the Commission's decisions which, from an analysis

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<sup>113</sup> The criteria for a full democracy were provided as follows: Basic political freedoms and civil liberties are respected, and tend to be underpinned by a political culture conducive to the flourishing of democracy. The functioning of government is satisfactory. Media are independent and diverse. There is an effective system of checks and balances. The judiciary is independent and judicial decisions are enforced. There are only limited problems in the functioning of democracies.

<sup>114</sup> The Guardian, Power in Africa: Democracy Mapped, <http://www.theguardian.com/global-development-professionals-network/ng-interactive/2015/feb/25/democracy-africa-maps-data-visualisation> accessed 12 February 2016.

<sup>115</sup> *ibid*

<sup>116</sup> Chidi Odinkalu, 'The Role of Case and Complaints Procedures in the Reform of the African Regional Human Rights System' (2001) 2 AHRLJ 225, 244.

<sup>117</sup> *Ibid*.

<sup>118</sup> See Chapter 5.

of the Charter, are not legally binding on states. However, while it may be accepted that those decisions are not binding, there is the graver issue, in the light of findings in this chapter, of why states would sign and ratify the Charter with little intention of upholding same. Arguments proffered towards this end are analysed below.

#### *Why States Do Not Adhere to Their Commitments under the Charter*

The question why states do not abide by their commitments is not a simple one. This is especially considering the general, even record-breaking, acceptance and ratification of the Charter. An interesting argument in this regard has however been made by Hansungule.<sup>119</sup> Firstly, he argues that the OAU's 'open door policy' which allowed any African state to join the Charter without questions asked on its state of democracy or human rights was responsible for making the Charter 'the only human rights instrument in the world to win near universal endorsement of the potential state parties in a record time.'<sup>120</sup> This was unlike other instruments like the European Convention on Human Rights which operated restricted criteria that required prospective member states to be democratic and be able to respect the rule of law. Hansungule argues that the text of the Charter encourages its accession even by the most repugnant preachers of human rights. This is because by creating a weak and 'timorous' institution the Charter ensured its ineffectiveness in stemming the tide of violations taking place. This was the intention of OAU states who 'worked hard' to ensure the Charter's weakness in order to protect their sovereignty. Evidence of this intent could be found in the last two provisions of the Committee of Ministers' Terms of Reference as follows:

'to ensure the protection and promotion of human rights declared and accepted as such through the activities of a commission, although reserving the powers of the Assembly which must be associated with the final decisions'; and

'not to exceed that which African states were ready to accept in the field of the protection of human rights.'<sup>121</sup>

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<sup>119</sup> Michelo Hansungule, 'The African Charter on Human and Peoples Rights: A Critical Review' (2000) 8 AYBIL 265

<sup>120</sup> *ibid* 266

<sup>121</sup> *ibid* 275-276



Given the above, Hansungule asserts that the system was deliberately not intended to be as strong as critics would have wanted and that criticisms of the Commission are based on an inflated expectation of a system that was not intended to deliver. It was also the fear of losing sovereignty that caused the Court to be deliberately left out.<sup>122</sup> Hansungule's point is, therefore, simple: states do not comply with the Charter because they were never fully committed to doing so. It is important, at this juncture, to recall a similar argument by Shivji<sup>123</sup> who saw the intent behind the Charter as deceitful. He argued that after the fall of three dictatorships,<sup>124</sup> African leaders needed to salvage their severely tainted human rights record and re-establish their qualification for Western aid, and only drafted the Charter to accomplish these aims.<sup>125</sup>

While some of the issues the above commentators raise may be incontrovertible, it is hard to accept every aspect of their arguments.<sup>126</sup> It is true, as has been earlier demonstrated in the thesis, that the Charter created a weak institution in order to cater for mostly new democracies which jealously guarded their sovereignties. However, rather than a sinister plot of deception, the Charter was a stepping stone that lured these mostly dictatorial countries, albeit gradually, into the unfamiliar world of human rights. Whichever the case, with the additional Protocols, especially that which established the Court, African states showed an increased willingness to gradually bind themselves to human rights. However, Hansungule's arguments still hold strong in the aftermath of the Court's creation as shown by the relatively low number of ratifications and declarations on individuals' jurisdiction. Unlike the Charter which was quickly and generally accepted, the Court's Protocol has largely been met with indifference. It is thus not hard to agree with Hansungule that 'the enthusiasm which greeted the African Charter through the unprecedented number of ratifications in a very short time [was] for most of these states nothing but an empty gesture'. The response to the Court must

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<sup>122</sup> *ibid* 278.

<sup>123</sup> See Chapter 1.

<sup>124</sup> Amin, Nguema, and Bokasa.

<sup>125</sup> Issa Shivji, *The Concept of Human Rights in Africa* (CBS 1989) 94.

<sup>126</sup> Shivji's position was addressed in Chapter 1.

be seen as a more accurate representation of the states' commitment to human rights protection—reluctance to commit and an aversion to superseding judicial authority. While signing up to the Charter required minor commitments (like sending in periodic reports), ratifying and signing the Article 34(6) Declaration of the Court's Protocol was more than the majority of states could commit to.<sup>127</sup> Thus, while the Charter, with its norms and weak institutions, was an initiation or birthing process, African states have shown that they are not quite ready to be weaned. The current position is summed up in Heyns' cautious assessment that, 'it is not clear that the political commitment necessary to sustain an independent and impartial regional human rights court in Africa exists.'<sup>128</sup>

The above conclusion has very serious implications for this research as it would mean that there are no easy policy solutions to the regional human rights system. This is the case because any viable policy reform suggestions would simply not be adopted or implemented as long as they demand a level of accountability and commitment from member states. This has already been demonstrated in the example of the Court's Protocol where only seven member states have made the declaration allowing individuals and NGOs to institute cases despite constant reminders by the Commission in its various Concluding Observations on State Reports. Other commonly canvassed options like the introduction of sanctions by the AU<sup>129</sup> against erring states may also not be feasible as the AU has down the years shown an unwillingness to demonstrate such commitment. For instance in 2015, after accusing the International Criminal Court of bias against African leaders and proposing a local solution in the form of the African Court of Justice and Human Rights,<sup>130</sup> Heads of States voted to allow sitting leaders and

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<sup>127</sup> As at the end of 2015 only 7 states had made the Declaration.

<sup>128</sup> Christof Heyns, 'Some thoughts on Challenges facing the International Protection of Human Rights in Africa' (2009) 27 NGHR 447, 448

<sup>129</sup> See Hansungule (n 119) 268; Mbazira (86) 333

<sup>130</sup> A proposed coalition of the African Court of Human and Peoples' Rights and the African Court of Justice.

senior officials immunity from prosecution in the proposed court.<sup>131</sup> This is despite the fact of Africa's long-serving leaders, nine of who have currently held such position for over 20 years,<sup>132</sup> and who by implication may never be tried for their offences.<sup>133</sup> Also, apart from cases of overthrow of governments,<sup>134</sup> the Assembly of Heads of State has hardly sanctioned a member state for serious violations of human rights. This obvious show of camaraderie at the helm of Africa's regional structure does not bode well for human rights protection and enforcement. Here, one can notice a political impasse with little hope for progress, save there is 'a change of heart'<sup>135</sup> by the AU and its member states.

#### *Facilitating a 'Change of Heart': Example from the ECOWAS Court*

While there appears to be limited political will at the regional level, there appears to be some measure of success in at least one of the sub-regions, the Economic Community of West African States (ECOWAS), in its development and sustenance of the ECOWAS Community Court of Justice (ECCJ). Originally created to adjudicate interstate disputes bordering on ECOWAS economic rules, the ECCJ has gradually metamorphosed into a human rights tribunal through the adoption of a Supplementary Protocol allowing the ECCJ to receive human rights complaints from individuals. It is interesting to note that, while West African governments authorised the ECCJ to review human rights suits filed by individuals, the same was not the case for private actors complaining about violations of ECOWAS economic rules such as the free movement of goods and persons, a situation which had propelled the reforms in the first place.<sup>136</sup> Rather the 2005 Supplementary

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<sup>131</sup> Monica Mark, The Guardian, African leaders vote themselves immunity from new human rights court (2015) <http://www.theguardian.com/global-development/2014/jul/03/african-leaders-vote-immunity-human-rights-court> accessed 18 February 2016.

<sup>132</sup> The Guardian (n 105).

<sup>133</sup> Consider for instance the case of Zimbabwe's President, Robert Mugabe, who (as at 2016) at 92 years of age, has ruled the country for 28 years.

<sup>134</sup> See Chapter 7.

<sup>135</sup> Mbazira (86) 333.

<sup>136</sup> In the case of *Olajide Afolabi v Federal Republic of Nigeria*, a Nigerian trader, Olajide Afolabi, who had entered into a contract to purchase goods in Benin, which were meant for transport to Nigeria, could not complete the transaction following the closing of the border between the two countries by the Nigerian government. After deliberations, the ECCJ ruled that under the Protocol, only member states could institute cases. The court restrained itself from making an expansive ruling, concluding

Protocol introduced three key features for human rights complaints in West Africa: direct access by individuals, open-ended legal norms, and non-exhaustion of domestic remedies.<sup>137</sup>

It is not easy to understand such audacious reforms for the ECCJ when the same ECOWAS member states have opposed or not complied with similar reforms at the regional level. A number of reasons have been adduced for this anomaly. One reason is that human rights NGOs lobbied hard for these features especially the omission of an exhaustion of local remedies requirement. These arguments and propositions were in turn accepted by ECOWAS officials who recognised, *inter alia*, that it was difficult for individuals to access national courts in human rights cases.<sup>138</sup> With regard to the lack of enumerated rights, it was proposed that governments assumed that the references to the African Charter in the ECOWAS treaty and other legal texts would lead the ECCJ to view the Charter as the Community's primary source of human rights norms. Also, they viewed the absence of an exhaustion requirement as an experiment that could be revisited if the system proved to be unworkable—this especially given the fact that the Protocol entered into force on a provisional basis.<sup>139</sup>

The ECCJ example is one rare demonstration of political will and commitment by African states. Unfortunately, this has not been replicated at the regional level and even other sub-regions.<sup>140</sup> While there are still cases of non-implementation of the ECCJ's decisions,<sup>141</sup> member states have usually protected its mandate.<sup>142</sup> The ECCJ, owing to

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instead that ECOWAS political bodies must expressly grant the ECCJ jurisdiction to hear suits from private actors.

<sup>137</sup> Laurence R Helfer and others, 'A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice' (2013) 107(4) AJIL 737.

<sup>138</sup> *ibid* 756.

<sup>139</sup> *ibid* 757.

<sup>140</sup> For instance the SADC disbanded its Tribunal following the latter's decision against Zimbabwe.

<sup>141</sup> Premium Times, 'ECOWAS frowns at non-enforcement of decisions by member states' April 22, 2014, <https://www.premiumtimesng.com/news/159166-ecowas-court-frowns-non-enforcement-decisions-member-states.html>, accessed 26 October 2014.

<sup>142</sup> Attempts by the Gambia to see them changed after two decisions were made against it were spurned.

its wider jurisdiction, also has a healthy docket of cases compared to the African Court.<sup>143</sup>

It is argued that the African Court can be developed in a fashion similar to the ECCJ. Thus, the requisite political will can be garnered by using the ECCJ as a reference point in such promotions. Also, the daring developments of the ECCJ, such as non-exhaustion of local remedies, show that despite their reservations African states could occasionally be made to conform to high, pace-setting standards.

#### **6.4.2 Positive Rights: Achievable or Ambitious?**

It may appear at first sight futile to discuss the ambitiousness of positive duties such as socio-economic provisions in the Charter when negative rights have been categorised as ambitious with regard to implementation. However, it must be pointed out that, as far as the system of government in place is concerned, a state may sufficiently provide for socio-economic rights while defaulting in negative civil and political rights. Reference may be made here to economically stable countries like Saudi Arabia and China of which, in spite of positive economic provisions, there are often reports of entrenched violations of civil and political rights.<sup>144</sup> This, however, may not be the case in Africa where, aside running unaccountable and often dictatorial governments, there are, generally, insufficient resources to meet these rights.

The ambitiousness of the Charter with regard to socio-economic rights can be seen in their justiciability and in the absence of a 'progressive realisation' clause.<sup>145</sup> The former was not the consequence of oversight as the Charter had consciously done away with a

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<sup>143</sup> The ECCJ's website displays 98 decided cases, roughly half of these having been decided on the merits as opposed to the Commission's three cases on the merit. See ECCJ, List of Decided Cases from 2004. till date,  
[http://www.courtecawas.org/site2012/index.php?option=com\\_content&view=article&id=157&Itemid=27](http://www.courtecawas.org/site2012/index.php?option=com_content&view=article&id=157&Itemid=27) accessed 19 February 2016.

<sup>144</sup> See for instance the various reports by Amnesty International and Human Rights Watch on alleged systematic infringements of such rights as the right to freedom of expression, freedom of association, and freedom of religion in these countries.

<sup>145</sup> See Chapter 3.

first draft that differentiated between economic, social and cultural rights.<sup>146</sup> By according these rights the same status as civil and political rights, the Charter emphasised their utmost importance and priority regardless of the states' financial positions. Viljoen states that the justiciability of socio-economic rights was a response to the prevailing situation of dire poverty and exploitation by kleptocratic elites. Thus its justiciability was an acknowledgement that accountability through the law was part of the solution.<sup>147</sup>

Three different positions will be used to demonstrate the ambitious nature of the Charter's stance. They are the provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the South African experience, and the Commission's decisions on communications. These are briefly examined below.

#### *Provisions of the ICESCR*

Article 2 of the ICESCR provides that each state party must undertake to take steps 'to the maximum of its available resources' to 'achieving progressively' the full realisation of the rights recognised in the Covenant, including particularly the adoption of legislative measures. In sharp contrast to the African Charter, this provision acknowledges the diverse economic strengths of member states and requires that they fulfil their obligations to the maximum of available resources. In interpreting this provision, the UN Committee on Economic, Social and Cultural Rights, has stated that the provision for progressive realisation should not be misinterpreted as depriving the obligation of all meaningful content. While it is, on the one hand, a necessary flexibility device reflecting the realities of the real world it, on the other hand, must be read in the light of the overall objective of the Covenant which is to establish clear obligations for states parties in respect of the full realisation of the rights in question. It, therefore, imposes an

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<sup>146</sup> Viljoen (n 86) 215.

<sup>147</sup> Ibid.

obligation to move as expeditiously and effectively as possible towards that goal.<sup>148</sup> This would imply that even when the available resources are demonstrably inadequate, the obligation remains for a state party to strive to ensure the widest possible enjoyment of the rights under the prevailing circumstances.<sup>149</sup> Theoretically, this would seem to reflect the Charter's intent as it cannot reasonably be the case that the drafters intended for states to fulfil their obligations even where it was practically impossible to do so. As will be seen shortly, the Commission has adopted a similar position. In any event, the absence of any qualification in the Charter despite the existence of a precedent in the form of the ICESCR is only a pointer to its high demands and expectation.

### *The South African Experience*

South Africa was the first of very few African states<sup>150</sup> to implement the principle of indivisibility of rights as opposed to the majority that relegated socio-economic rights to non-justiciable directive principles of state policy.<sup>151</sup> The country's 1996 Constitution included a range of socio-economic rights, with the most important of these contained in sections 26 and 27. The former provides for the right to have access to adequate housing while the latter guarantees the right to have access to health care services, sufficient food and water, and social security. However, both of these sections are qualified by the provision that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights. Thus, while adopting the justiciability of these rights as guaranteed under the Charter, South Africa was careful to insert the 'available resources' and 'progressive realisation' clauses present in the ICESCR.

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<sup>148</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3, The nature of States parties obligations* (art 2, para 1 of the Covenant), UN Doc E/ 1991/23 (1990) para 9, cited in Dennis M Davis, 'Socioeconomic Rights: Do They Deliver the Goods?' (2008) 6(3&4) ICON 687, 699.

<sup>149</sup> Athew C Raven, *The International Covenant of Economic, Social and Cultural Rights* (Clarendon Press 1995) 138 cited in Davies (n 148) 700.

<sup>150</sup> Kenya recently adopted a Constitution that entrenched justiciable socio-economic rights.

<sup>151</sup> Viljoen (n 86) 218.

Despite these safeguards and other supportive framework, the enforcement of socio-economic rights through litigation has proven to be challenging. Keightley identifies the primary underlying factor for this as ‘the disjuncture between the constitutional promise to effect social justice through the enforcement of socio-economic rights, and the actual extent of the socio-economic need on the ground’.<sup>152</sup> The poverty gap in South Africa is huge, as well as the backlog in the provision of basic services, that it far outstrips the capacity of the state’s available resources to effect delivery.<sup>153</sup> As such, the burden of expectation on the courts to fill the gaps through socio-economic rights adjudication is disproportionately high.<sup>154</sup> This has prompted the country’s Constitutional Court to interpret these rights as well as the corresponding obligations on the states in the light of the ‘relevant social and historical context’. While they remain justiciable, there are clearly limitations in the area of litigation. Thus, the courts would not take over the duties of the executive and legislative arms of government whose responsibility it is to assess social and economic needs and put in place measures to fulfil these needs. While the state is required to set clear targets for the fulfilment of its socio-economic obligations and to explain its policy choices, the courts will not interfere provided the policy is reasonable and the process followed is not flawed.<sup>155</sup>

The approach of striking a balance between holding the exercise of public power accountable to the Constitution and deferring to the policy choices of the government has been adjudged to have resulted ‘in very modest gains for the poor’.<sup>156</sup> This only goes to show the practical difficulty in enforcing these rights and placing them on the same

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<sup>152</sup> Raylene Keightley, ‘The Challenges of Litigating Socio-Economic Rights in South Africa’ (2011) NZLR 296, 305.

<sup>153</sup> Christopher Mbazira, ‘Appropriate, Just and Equitable Relief’ in Socio-Economic Rights Litigation: The Tension between Corrective and Distributive Forms of Justice’ (2008) 125 SALJ 71 at 86 cited in Keightley (n 152) 305.

<sup>154</sup> Keightley (n 152) 305.

<sup>155</sup> For instance, the question of whether the measures adopted to give effect to socio-economic rights are reasonable or not will depend to a great extent on the particular difficulties and resource challenges faced by the state. See *Mazibuko v City of Johannesburg* [2009] ZACC 28, 2010 (4) SA 1 at 61; Keightley (n 150) 308. See also the case of *Government of the Republic of South Africa & Ors v Grootboom & Ors* 2000 (11) BCLR 1169. (CC) where the court held that the applicants were entitled to be provided with basic shelter as Article 28 of the South African Constitution was not subject to available resources.

<sup>156</sup> Davis (n 148).



level as negative rights. As the South African Court has observed, limitations must be placed on litigating socio-economic rights as the other arms of government are better placed, more so statutorily, to make such policy decisions. It would, therefore, amount to usurping the roles of these other arms for the courts to routinely overrule their decisions. As such, it has been argued that socio-economic rights 'may well promise more than they can deliver', even though the modest consequence of compelling government to justify its policy choices when they affect the poor should not be discounted.<sup>157</sup>

The South African example, being one instance of enforcement of socio-economic rights in Africa, goes to illustrate the practical difficulties of litigating these rights even where the 'available resources' and 'progressive realisation' clauses exist. Such example can only demonstrate the high expectations of the African Charter which does not include these clauses.

#### *The Commission's Position*

Perhaps the most obvious evidence of the Charter's ambitiousness is in the position taken by the Commission when deciding the relatively few complaints on socio-economic rights. Despite the obvious absence of the notions of 'progressive realisation' and 'available resources', the Commission read these into the Charter in the case of *Purohit and Moore v. The Gambia*<sup>158</sup> (the *Purohit case*). In interpreting the state's duty under Article 16 (right to health), the Commission stated thus:

The African Commission would ... like to state that it is aware that millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty which renders them incapable [of providing] the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right. Therefore, having due regard to this depressing but real state of affairs, the African Commission would like to read into Article 16 the obligation on part of states party to the African Charter to take concrete and targeted steps, while taking full advantage of its available

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<sup>157</sup> Ibid.

<sup>158</sup> Communication no 241/01.

resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind. (Emphases added).<sup>159</sup>

The Commission's position above has been suggested to establish that the availability of resources is a relevant factor when determining whether a state is in violation of the socio-economic rights in the African Charter.<sup>160</sup> Thus, a state should not be held to be in violation in such cases as seen in Chapter 4 as long as it can be shown that the available resources are not sufficient to meet those needs.

In summary, the above sections have demonstrated that the expectations of the Charter with regard to socio-economic rights were and remain higher than attainable, at least to the extent of equating the delivery of civil and political rights with socio-economic rights. However, taking into consideration the South African example, it would be more pragmatic to demand their justiciability by states albeit with the qualification of 'progressive realisation' according to 'available resources'.

#### *The Importance of Justiciability for Africa*

While it is accepted that most African states cannot adequately fulfil their socio-economic obligations, it would be retrogressive to suggest that they be rid of any form of accountability for these duties. The inclusion and accordance of a relatively high status to socio-economic rights in the Charter was deliberate. As has already been argued, it was a response to the prevalent poverty in African states often occasioned by corrupt and inefficient governments.<sup>161</sup> The correct progressive step was to make these rights justiciable to allow for some measure of state accountability. An enforceable system of socio-economic rights could provide a means of challenging governments' priorities and holding them accountable for the expenditure of international aid and loans.<sup>162</sup> Agbakwa argues that poor economic conditions do not justify outright non-

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<sup>159</sup> para 84.

<sup>160</sup> Mbazira (n 86) 353.

<sup>161</sup> See Viljoen (n 86) 104.

<sup>162</sup> Shedrack Agbakwa, 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights (2002) 5 YHRDLJ 177.

enforcement but should merely affect the extent to which these rights can be realised. Rather than be seen as a clog in its wheel, the enforcement of these rights could actually catalyse development. It could also reduce the spate of armed conflicts most of which are caused by the denial of these rights to the people who believe that taking up arms against the government is the only way to fight for their enforcement. In other words, if there are no legitimate ways to enforce these rights, the people may resort to armed revolutions.<sup>163</sup> This latter argument is supported by Bulto who argues that justiciability of socio-economic rights is 'perhaps the most viable means' through which marginalised and impoverished groups can voice their grievances and oppose any systematic exclusions that they face.<sup>164</sup> It is unfortunate, therefore, given the many arguments in favour of justiciability, that the vast majority of African states have chosen the opposite path of non-justiciability.

#### *Solution through the Regional System*

While the most obvious path forward would be for states and national parliaments to make socio-economic rights justiciable, an argument can also be made for the regional system to take over the role of enhancing their justiciability. Generally, a complaint can only be brought before the Commission where the applicant has exhausted domestic remedies. However, given the non-justiciable nature of socio-economic rights in most African states, the Commission, it has been argued, would exercise original jurisdiction on economic and social rights since individuals cannot be expected to exhaust domestic remedies which do not exist.<sup>165</sup> Thus the Commission would be examining alleged violations of socio-economic rights as a tribunal of first instance.<sup>166</sup> This would allow the opportunity of further developing the jurisprudence of these rights. Much as compliance with decisions may not be guaranteed as seen in the cases of negative rights violations, such pronouncements and jurisprudential developments could set the tone for future

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<sup>163</sup> *ibid.* See also Bulto (n 99) 147, Viljoen (86) 215.

<sup>164</sup> Bulto (n 99) 152.

<sup>165</sup> Nana K A Busia, Jr and Bibiane G Mbaye, 'Filing Communications on Economic and Social Rights under the African Human and Peoples' Charter (The Banjul Charter)' (1996) 3(2) EAJPHR 188, 197 cited in Bulto (n 99) 149.

<sup>166</sup> Bulto (n 99) 149.

legislative measures and precedential references. It has accordingly been pointed out that, given that the adjudication and jurisprudence of socio-economic rights have yet to take root in a great majority of domestic jurisdictions across the continent, the fate of socio-economic rights is bound up with the prospects of the African regional human rights mechanism generally.<sup>167</sup>

However, despite what may appear as an opportunity for the Commission, socio-economic rights have mostly been relegated to the background in terms of normative and jurisprudential development. The Commission's 'case law' has mostly dealt with negative civil and political rights such as the right to fair trial, freedom of speech and freedom from torture, inhuman and degrading treatment.<sup>168</sup> The fault is however not entirely the Commission's and largely owes to the fact that civil society actors have mostly raised issues relating to civil and political rights despite the existence of numerous socio-economic problems.<sup>169</sup> After more than two decades of coming into force, the African Commission had dealt with relatively few communications dealing principally with socio-economic rights.<sup>170</sup>

It becomes clear that, to improve legal accountability and the justiciability of these rights, the regional system must step up its role.<sup>171</sup> It must, however, be pointed out that the legal/judicial option is only an aid and not a solution to the enforcement of socio-economic rights. This conclusion can be easily garnered from the analysis of the South African experience. Supporting this argument, Keightley states that the difficulty for lawyers involved in socio-economic rights work in South Africa was that, because of the weakness in other parts of the system, 'disproportionate reliance' was sometimes

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<sup>167</sup> Chidi Anselm Odinkalu, 'Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights under the African Charter on Human and Peoples' Rights' (2001) 23 HRQ 327, 366.

<sup>168</sup> Ssenyonjo (n 98) 360.

<sup>169</sup> *ibid*

<sup>170</sup> See Bulto (n 97) 144, Mashood Baderin, "The African Commission on Human and Peoples' Rights and the Implementation of Economic, Social and Cultural Rights in Africa" in Baderin and McCorquodale, (Eds.) *Economic, Social and Cultural Rights in Action* (OUP, 2007) 139.

<sup>171</sup> How the Commission could do this will be analysed in the next chapter.

placed on finding a solution through the law in order to rectify the hardships suffered by many South Africans.<sup>172</sup> As has been seen above, this has not always yielded the desired results.

It is important to further point out that the Commission's proposed role as a tribunal of first instance would not necessarily conflict with the existence of the Court. This is owing to already discussed restrictions on individual/NGO access to the Court, an obstacle that would be avoided were a complaint to be brought before the Commission.

## **6.5 Conclusions on Governments' Enforcement of the Charter**

The aim of this chapter has been to interpret the discrepancies between the theory and practice by states of human rights under the African Charter with the aim of better understanding these challenges and thereby setting the stage for practical reforms. Overall, the above analyses reveal two main causes of poor implementation of the Charter by member states. On the one hand is the governments' low level of commitment evidenced by occasional sheer disregard of the provisions of the Charter and the reluctance to promote judicial accountability at the regional level. On the other hand are practical challenges (such as lack of resources, poverty, obnoxious customary practices, and illiteracy) that governments face when trying to implement the Charter. Thus, were it to be the case that governments were fully willing and cooperative in implementing the Charter, they would still fall short of the Charter standards. This would be true not only for positive socio-economic and peoples' rights but also negative civil and political rights. With regard to the challenges affecting the implementation of civil and political rights, it was posited that, while proposing economic measures that would increase human and financial resources may be outside the purview of the research, the other challenges like culture and ignorance may be reasonably countered through effective promotion by all of the relevant actors. Such step requires a concerted effort by these actors to meet the huge need for knowledge of these rights and how to protect

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<sup>172</sup> Keightley (n 152) 321.

them through a viable Plan of Action. It is important to recall at this stage that promotion of human rights is also one of the key duties of the Commission which will be further examined in the next chapter. With regard to socio-economic rights, the case was made for the justiciability of these rights. Even though resource constraints constitute a major impediment, it was argued that states should subject themselves to that minimum level of accountability provided by the courts. The case was further made for the Commission to, exploiting the non-justiciability of these rights in many states, adjudicate on issues arising therefrom thereby developing the jurisprudence in that area. In any event, it was pointed out that justiciability should not be viewed as an end in itself but only a means to such end. Even though it may not necessarily guarantee the implementation of these rights in some countries, justiciability is a necessary first step.

The chapter further dealt with the issues of political will and cooperation from member states. Here it was established that African states are generally not fully committed to the regional system especially in the area of judicial accountability. Even commitment to the regional normative standards is questionable for some states. While the African regional system has adopted a gradual initiation process to introduce otherwise dictatorial regimes to a functional regional human rights system, it appears that some states by their positive systemic violations of rights are not quite ready to commit to these standards. Thus, after acceding to these standards, these few states have accorded priority to other political considerations in their dealings with their respective citizenry. The implication of this is that, to the extent that the lack of political will constitutes a problem to the implementation of the Charter, policy reforms offer little hope for improvement. This is because sincere political commitment is necessary for the application of these reforms. For human rights to thrive, African governments must be willing to enforce the Charter and also subject themselves to accountability under the regional system. Since human rights are owed to the individual, it makes little sense that these same individuals are not, for instance, allowed access to the Court by over 86% of member states. While they do have access to the Commission, the latter has been plagued with concerns about the status of its decisions or 'recommendations', which

explains the subsequent creation of a Court. Theoretically, the Court should ideally be best placed to play the role of arbiter, but with only three decisions on the merit since its inception, having been largely constrained by jurisdictional limitations, the Commission necessarily occupies this position, at least in the interim. What this entails is that member states have to develop a culture of implementing decisions of the Commission and this requires a higher level of commitment than being currently displayed. It has already been demonstrated, through the example of the ECCJ, that African governments can indeed make some of these concessions and commitments. This would likely require constant prodding from external actors like NGOs, a subject briefly examined in the next chapter.

At this stage, having interpreted the discrepancies as they relate to the state, it is appropriate to move on to the second part of the final stage which addresses the discrepancies as they relate to the institutions. Accordingly, the next chapter will analyse the major challenges to the mandates of the institutions, the Commission and Court, and how they can be addressed to improve the implementation of the Charter

## **CHAPTER 7**

### **7 Addressing the Institutional Ineffectiveness of the Regional System**

#### **7.1 Introduction**

It has been established, over the course of the research, that the African regional human rights machinery has been largely ineffective in exacting respect and compliance with the provisions of the African Charter. The starting point of this was Chapter 4 which revealed a disproportionate rate of state violations as well as disregard for state reporting duties and Commission recommendations. Chapter 5, which analysed the practice of the institutions, revealed a record of poor usage (very extreme in the case of the Court), very low levels of implementation and jurisdictional limitations. While the last chapter dealt with two important causes for the disparity between theory and practice namely governments' low level of commitment and other practical socio-economic and cultural challenges, this chapter addresses the third and equally important hindrance of institutional ineffectiveness. With the various institutional challenges having already been introduced in Chapter 5, this chapter will mainly analyse them along with ways of updating and revising institutional practice to overcome these challenges posed both at the institutional level and by the other two aforementioned causes of poor implementation.

#### **7.2 The Commission**

The Commission has so far proven to be the continent's prime institution in terms of human rights promotion and protection based on years of operation as well as statistics



of general usage.<sup>1</sup> Given the jurisdictional limitations of the Court, the Commission stands as the only regional body before which individuals can bring human rights complaints against any AU member state. With such wide coverage, it is therefore a cause for concern that the Commission has heard less than 500 complaints in its 30 years of operation while its European counterpart (the European Court of Human Rights) by way of comparison had nearly 120,000 pending applications at the start of 2010,<sup>2</sup> with 10,407 pending cases in 2012.<sup>3</sup> When one considers that just five states<sup>4</sup>—given their relatively poor human rights reputation—accounted for more than 60% of the former (that is, 69,100 applications),<sup>5</sup> it is easy to see that a similar translation in Africa, where quite a few countries have a penchant for human rights violation (not to talk of the frequent occurrences of sectarian crises including cases of genocide), would ideally run into millions of applications. That this is not the case, even remotely so, is a testament to the gross inefficiency of the system.

A number of reasons have been adduced for the Commission's poor usage ranging from lack of enforcement of decisions to lack of awareness of the general workings of the system. Having already highlighted some of these underlying issues in Chapter five, the following sections will, in examining them, propose and critically evaluate some pragmatic steps aimed at tackling them. Such examination will be grouped into the Commission's stipulated duties of promotion and protection of human rights.

### **7.2.1 The Commission's Duty of Promotion**

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<sup>1</sup> See Chapter 5.

<sup>2</sup> The Open Justice Initiative, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions*, <http://www.opensocietyfoundations.org/sites/default/files/from-judgment-to-justice-20101122.pdf> accessed 15 March 2015.

<sup>3</sup> Council of Europe, *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights: 6<sup>th</sup> Annual Report of the Committee of Ministers 2012* (Council of Europe 2013).

<sup>4</sup> Russia, Turkey, Romania, Ukraine, and Italy.

<sup>5</sup> The Open Justice Initiative (n 2).

Previous chapters have already touched on the subject of promotion and its importance in tackling some of the challenges to the implementation of the Charter. It was opined that the level of promotion in the continent had to be improved to address not only the huge gap in knowledge but also pockets of harmful cultural practices. This chapter addresses some of the peculiar challenges of promotion as it relates to the Commission's duty under the Charter. It has already been established in Chapter 5 that the Commission has largely not met the standards of promotion under the Charter due to a number of challenges. The following sections will examine these challenges under the following headings: challenges faced under the state reporting system and the lack of general awareness and publicity on the use and activities of the Commission. Just as has been done in previous chapters, the aim in keeping with the adopted methodology is to understand and interpret these challenges and discrepancies thereby setting the pace for and making practical reform proposals.

### *The Challenges of the State Reporting System*

The examination of State Reports has been described as the 'core' of the Commission's promotional mandate.<sup>6</sup> In Chapter 4, which examined the content of State Reports, it was explained that this promotional duty of monitoring compliance was severely affected by the failure of states to submit their reports as at when due. Records from recent years show that the practice has worsened rather than improve. For instance, at the end of 2014, only 13 states had submitted all their reports while 10 states were late by one or two reports; 24 states were late by three or more reports while seven states had not submitted any reports.<sup>7</sup> However, as of March 2016 (barely over a year), only nine states had submitted all of their reports increasing the number of countries late by one or two reports to 15. The number remained at seven for states that had made no

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<sup>6</sup> Frans Viljoen, *International human rights law in Africa* (OUP 2012) 349.

<sup>7</sup> African Commission on Human and Peoples' Rights, <http://www.achpr.org/states/reports-and-concluding-observations/> accessed 16 November 2014.

submissions with the only slight improvement coming in the penultimate category where 23 (as opposed to 24) states were late by three or more reports.

The extent of non-compliance with the submission of State Reports is better grasped when one realises that no state has met the prescription of Article 62 of the Charter requiring that reports be submitted every two years.<sup>8</sup> Thus, even the handful of states that have submitted all of their reports have only managed to do so after having being encouraged by the Commission, via a *note verbale*, to consolidate outstanding reports into a single report, thus catching up on any backlog in one go.<sup>9</sup> The next section examines some of the causes of this discrepancy along with ways of addressing or mitigating them.

#### *Factors Affecting the Timely Submission of Reports*

Two main factors can be identified here. They are the ambitious time period imposed by the Charter and the lack of resources demonstrated by inadequate national structures and inefficient governmental processes.

##### **Ambitious Time Period**

Much has been said in the previous chapter of the relatively high normative standards set by the Charter. Another area where this ambitiousness is noticeable is in the time period set for submission of State Reports. Article 62 mandates state parties to submit such a report every two years. While this may appear reasonable, it has been argued that 'when compared with other human rights treaties, the period of two years is unrealistically short'.<sup>10</sup> This position has been canvassed in some State Reports with Kenya stating in its report that the two-year rule was 'too short' and had the 'the

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<sup>8</sup> Viljoen (n 6) 355.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

potential of undermining the quality of expected reports'.<sup>11</sup> The Commission's encouragement of consolidated reports could be interpreted as a tacit acknowledgement of the impracticality of this provision. Going even further, it has been recommended at a brainstorming meeting between the Commission and Court, for the AU to consider reviewing the Charter to render the submission and presentation of State Reports from two years to four years.

#### Lack of Adequate Resources

Just as is the case with the enforcement of rights, the lack of resources and structures at the national levels affect administrative functions like the preparation of State Reports. In its report, Kenya alluded to a lack of 'requisite resources' to undertake the close spaced reporting process.<sup>12</sup> Also, the APRM<sup>13</sup> Country Review Team, while reporting on Ghana, identified 'a major weakness in the internal systems of the Ministries of Foreign Affairs and Justice', and suggested that the government strengthen those departments and institute a mechanism for 'automatic compliance' with reporting obligations.<sup>14</sup> It is clear that this direction should apply to those states facing similar challenges which conceivably will be quite a few going by the number of defaulting states.

While the creation/strengthening of national structures to respond to basic duties like state reporting is a necessary first step, it is reasonable to suggest that such efforts do not end there. Efforts should also be made towards developing national systems and bodies tasked with overseeing the implementation of decisions of the Commission and Court. Even though some states have set up specific units within their Justice or Foreign Affairs Ministries for this role and even gone further to create national human rights

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<sup>11</sup> Republic of Kenya, Combined 8th-11th Periodic Report on the African Charter on Human & Peoples' Rights (2014) para 182 [http://www.achpr.org/files/sessions/57th/state-reports/8th-11th-2008-2014/kenya\\_state\\_report\\_eng.pdf](http://www.achpr.org/files/sessions/57th/state-reports/8th-11th-2008-2014/kenya_state_report_eng.pdf) accessed 12 January 2016.

<sup>12</sup> Ibid.

<sup>13</sup> Africa Peer Review Mechanism.

<sup>14</sup> APRM, Country Review Report of the Republic of Ghana, June 2005, paras 12-13 cited in Viljoen (n 6) 355.

institutions, it is clear that such steps are not universal.<sup>15</sup> To buttress the importance of this approach the ECCJ, which was briefly examined in the previous chapter, has continually urged countries to appoint competent national authorities for the enforcement of that court's decisions.<sup>16</sup> This is because, despite its earlier highlighted jurisdictional successes, the ECCJ faces similar challenges as the Commission with regard to the implementation of its decisions. Also, in a recent study of states' compliance with decisions of the European Court of Human Rights,<sup>17</sup> it was found that variation in state implementation performance was closely linked to the overall legal infrastructure capacity and government effectiveness of a state. Where capacity and effectiveness were high and diffused, there was less likelihood that adverse judgments would be obstructed or ignored, even when the government, political elites, or other actors were reluctant and not in favour of substantive remedies. Even though based on the European system, it is easy to see how the results of this research apply to the African situation even going further from enforcement of decisions to the performance of such basic duties as submitting State Reports. It makes sense to assume that the required administrative functions are very likely not to be carried out where there are no institutions or administrative bodies to see to their implementation. Thus Viljoen asserts that inadequate internal governmental processes and bureaucratic bungling among others account more for failure to submit reports rather than a concerted lack of political will.<sup>18</sup>

It is important to note the recurrence of this theme of lack of adequate structures and resources which would fall under the second main hindrance identified in Chapter 6. Its role in such areas as the preparation of State Reports highlights the interconnectedness of the three specified hindrances to the practice of the Charter.

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<sup>15</sup> See Rachel Murray and Elizabeth Mottershaw, 'Mechanisms for the Implementation of Decisions of the African Commission on Human and Peoples' Rights' (2014) 36(2) HRQ 349.

<sup>16</sup> Premium Times, 'ECOWAS Frowns at Non-Enforcement of Decisions by Member States' April 22, 2014, <https://www.premiumtimesng.com/news/159166-ecowas-court-frowns-non-enforcement-decisions-member-states.html>, accessed 26 October 2014.

<sup>17</sup> Dia Anagnostou and Alina Mungiu-Pippidi, 'Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter' (2014) 25(1) EJIL 205, 224.

<sup>18</sup> Viljoen (n 6) 355.

## Political Will

Granted that poor or inadequate structures affect the preparation of reports, it would be naïve to rule out, at least in some cases, the lack of seriousness or political will that accompanies non-submission of State Reports. When one considers the number of countries, even relatively economically stable ones, that have not submitted any reports or that are late by more than three reports, the case for a lack of interest or seriousness in compiling these reports becomes even stronger. Having already examined at length the subject of political will in previous chapters, this chapter will, in keeping with the stages of immanent critique, go on to address the question of how the institutions can play a role in improving compliance and propelling states to fulfil their duties under the Charter. Much of this is done in later sections.

## *Publicity and Awareness*

Crucial to the Commission's promotional duty is the need to educate and create awareness on human rights in the continent. Some of the steps specified in the Charter include organising seminars, symposia and conferences, disseminating information, and 'encouraging' national and local institutions concerned with human rights.<sup>19</sup> While the Commission has undoubtedly taken bold initiatives to promote human rights in target countries, it must be acknowledged, as pointed out in previous chapters, that such steps are minuscule relative to the size of the continent and number of countries involved. It would be harsh, however, to solely criticise the Commission for this failure as the task of promoting human rights across the continent cannot reasonably be foisted on the shoulders of a lowly-manned and underfunded body.<sup>20</sup> That being said, the Commission, as shown in Chapter 5, has not demonstrated the required competence in the area of promotion. Given that the Commission is no doubt aware of the need for publicity and promotion, the question that arises is why it has not taken the necessary steps to increase publicity. To answer this question, it is necessary to study the composition of the Commission and the resources allocated to it.

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<sup>19</sup> Art 45.

<sup>20</sup> See relevant sections below.

### *Structure of the Commission*

Having so far made a case for the poor state of human rights in Africa and the magnitude of work needed to ameliorate the various lapses, one would expect that the body primarily tasked with this role would be adequately empowered and capacitated to do so. The reverse is, however, the case as the Commission is grossly understaffed being composed of only eleven members who act on a part-time basis. Umozurike, himself a former Chairman of the Commission, has argued for an increase in the number of Commissioners as dividing eleven part-time Commissioners among 52 states only made the task of promotion harder.<sup>21</sup> By way of comparison, he points out that the European Commission had a member from each member state and even though the Inter-American Commission had just seven members, promotion was not included in their functions.<sup>22</sup> Considering, on the other hand, the amount of promotional work left to the Commission, one wonders why all the Commissioners work part-time. Given that some of them are full-time law teachers, members of NGOs, and even ambassadors of their respective countries, they cannot reasonably be expected to devote full attention to the Commission's promotional work.<sup>23</sup> This challenge is also shared with the Court, as it would be recalled from Chapter 5 that the Court has consistently cited the part-time nature of the judges' work as a constraint to the effective performance of its duties under the Charter.

Despite calls to increase the number of commissioners, the status quo remains unchanged. Even calls to have the Chairperson of the Commission serve on a full-time basis have so far gone unheeded. Viljoen opines that this situation, coupled with the fact that the Commission meets only twice annually for less than 15 days, shows that the

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<sup>21</sup> Oji Umozurike, 'The African Charter on Human and Peoples' Rights: Suggestions for more effectiveness' (2007) 13 ASICL 179, 185

<sup>22</sup> *ibid* 185

<sup>23</sup> Michelo Hansungule, 'The African Charter on Human and Peoples Rights: A Critical Review' (2000) 8 AYBIL 265, 298

Commission was designed to accomplish very little. This situation has also been linked to the small number of annual decisions by the Commission.<sup>24</sup> One would expect that an important body like the Commission would have full-time members dedicated to the promotion of human rights. The current situation, it is argued, is inconsistent with the level of work required.

It would be recalled that the Commission was created with a weak mandate, at least in the area of protection. The existence of a fully manned body would have at least compensated in some measure for this defective mandate. It, however, appears to be the case that the Commission is weak both in mandate and operation, and worse still is the fact that such weakness appears to be intentional, or at the very least the product of indifference. The outcome is more so surprising given the high expectations required of states by the Charter. That a weak body was created both in mandate and operation to oversee the Charter's implementation only goes to support previously analysed arguments that the Charter was largely a charade with no real intent of implementation, an argument that has surfaced a few times over the course of this research.<sup>25</sup>

While the structuring of the Commission no doubt affects the fulfilment of its promotional duties, there is yet another equally debilitating constraint which is the lack of adequate funding.

#### *Inadequate Resources and Funding*

The inadequacy of resources available to the Commission has been described as the most important challenge to its operation.<sup>26</sup> Lack of funding means that the Commission cannot undertake promotional visits to many countries with its few visits being made

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<sup>24</sup> Jeremy Sarkin, 'The Role of Regional Systems in Enforcing State Human Rights Compliance: Evaluating the African Commission on Human and Peoples' Rights with Comparative Lessons from the Council of Europe and the Organisation of American States' (2008) 1(2) IAEHRJ 199, 221.

<sup>25</sup> See Chapters 1 and 6 analysing the arguments of Shivji and Hansungule respectively.

<sup>26</sup> Frans Viljoen, 'A Human Rights Court for Africa, and Africans' (2004) 20 BJIL 1, 55



possible mainly by donations from outside the continent.<sup>27</sup> In one instance, the Special Rapporteur on Prisons reported that, while he received numerous requests to conduct prison inspections in some countries, none materialised due to a lack of resources.<sup>28</sup> This situation also means that the overwhelmed commissioners cannot appoint enough staff to oversee day to day activities of the Commission. This problem of funding has been persistent and unresolved with the call for financial and other support to the Commission being the most consistently recurring theme in the resolutions and decisions of both the OAU and the AU Assembly.<sup>29</sup> These calls notwithstanding, the Commission is yet to see a significant change in the resources allocated to it. Following the AU's failure to come to its aid, the Commission has had to largely rely on external donations. Such donations have come from the European Union and UN Commission for Human Rights as well as foreign institutions like the Danish Agency for International Development, Swedish International Development Agency and Raoul Wallenberg Institute for Human Rights and Humanitarian Law.<sup>30</sup> With these donations, the Commission has been able to hire a few staff, organise conferences, and engage in other promotional ventures. Like the shortage of manpower, lack of resources is not peculiar to the Commission as this challenge is also experienced by the Court. It would be recalled from Chapter 5 that the Court reported a 'lack of resources' to include the lack of basic furniture and working equipment.

### *Interpretation and Way Forward*

The underfunding of the Commission and Court does not bode well for the regional system. In the case of the Commission, its initial neglect had partly been attributed to the fact that its budget was subsumed under that of the Political Affairs Department, a

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<sup>27</sup> Hansungule ((n 23) 298.

<sup>28</sup> African Commission, 'Twenty-Third Activity Report of the African Commission on Human and Peoples Rights, submitted in conformity with article 54 of the African Charter on Human and Peoples' Rights' May 2007 to May 2008, Annex 11.

<sup>29</sup> Viljoen, *International Human Rights Law in Africa* (n 6) 179.

<sup>30</sup> Umozurike (n 21) 187.

situation which changed in 2008.<sup>31</sup> With this change came an increase of 400% in the Commission's budget from \$1,199,557 in 2007 to \$6,003,856 in 2008.<sup>32</sup> This increase notwithstanding, the Commission remains seriously impaired in its operation. An indication of this is seen in the Commission's 37<sup>th</sup> Activity Report where, in discussing its financial situation, the Commission gives a glimpse into its poor state:

'Communication with the Commission and its Secretariat remains a huge challenge... Telephone landlines do not work and the Office has to rely on a form of cordless phone system...which is not as efficient...the fax is not working; internet connectivity continues to be a major problem for the Commission; even the Microsoft Outlook installed by the AU Commission Headquarters to link all AU organs and offices is erratic at best... both member states and stakeholders have expressed frustration regarding the difficulties of transmitting documents to the Commission.'<sup>33</sup>

Such recent state of affairs, as shown above, is no doubt unfortunate and only goes to show the near indifference to such an important institution. The Commission's budget has averaged less than 2% of the AU's general budget and has, on at least three occasions from 2005 to 2007, accounted for less than 1% of the Union's total budget.<sup>34</sup> What these figures show is a lack of seriousness towards empowering the Commission and by extension the regional human rights architecture. While the Commission has struggled to make gains despite its lean resources, the AU has not responded with appropriately increased funding. It has accordingly been contended that the AU's 'schizophrenic' pattern of praising the Commission's accomplishments while starving it of resources suggests that it does not intend for it to become more effective and forceful. Failure by the AU to meet the Commission's needs, it is argued, 'displays a cynical satisfaction with the Commission's minimal success.'<sup>35</sup> Given the facts above, it is difficult to argue with this position. Such a systematic short-changing of the

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<sup>31</sup> Viljoen, International Human Rights Law in Africa (n 6) 294.

<sup>32</sup> African Commission, Combined 32<sup>nd</sup> and 33<sup>rd</sup> Activity Report of the African Commission on Human and Peoples' Rights (2013) EX.CL/782(XXII) Rev 2, 26.

<sup>33</sup> African Commission, '37<sup>th</sup> Activity Report of the ACHPR', [http://www.achpr.org/files/activity-reports/37/actrep37\\_2015\\_eng.pdf](http://www.achpr.org/files/activity-reports/37/actrep37_2015_eng.pdf) accessed 13 January 2016.

<sup>34</sup> African Commission, Combined 32<sup>nd</sup> and 33<sup>rd</sup> Activity Report (n 32).

<sup>35</sup> Viljoen, International Human Rights Law in Africa (n 6) 297.

Commission is in line with the clear restriction of its protective mandate under the Charter. One would have thought that, with its protective mandate effectively curtailed, the Commission would be given maximum support in fulfilling its promotional mandate. The contrary, however, appears to be the case. Furthermore, no programme budget is allocated to the Commission from the member states meaning that the Commission effectively relies on partner funds to implement its promotional mandate.<sup>36</sup> While international assistance of the Commission is a welcome development, it goes to show the failure and reluctance of African states to grow their own regional human rights institution.

The challenge of funding has prompted suggestions and moves towards ensuring the independence of the Commission with regard to resource and budgetary matters. One such proposal has been for the establishment of a Fund to be financed by voluntary contributions from member states, international and regional institutions, and even private sources. In 2006, the Commission passed a Resolution which called upon the AU Commission to present to the Executive Council a draft decision for the establishment of a Fund, for the Commission, to be financed by voluntary contributions.<sup>37</sup> In line with the call, the Executive Council made the necessary request to the AU Commission to put such a system in place. It is not clear what steps, if any, have been taken towards this end. Rather, the Commission has recently taken to revealing the contribution of 'partners' in its approved final budgets. Such contributions average less than 30% of the budget with the remainder being member states' assessed contributions.

In terms of money approved for its operation, not much has changed for the Commission as it continues to complain that the approved budget is not adequate to support its activities. It is obvious that proactive steps ought to be taken by both the AU as a whole, individual states, and the Commission towards augmenting the resources available to the Commission. On the part of the AU, it must augment the resources currently

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<sup>36</sup> African Commission, '37<sup>th</sup> Activity Report' (n 33).

<sup>37</sup> See Paragraph 23 of the Kigali Declaration of the AU Ministerial Conference on Human Rights in Africa 2003; also Umozurike ( 21) 188.

assigned to the Commission to reflect the human right needs of the continent. A starting point would be allocating a programmes budget to the Commission, a step the AU has failed to take so far. Given the importance of promotional activities, it is surprising that the AU does not allocate programme budgets to either the Commission or Court.<sup>38</sup> Also, aside their assessed contributions, states could initiate a policy of funding promotional activities in their respective states.

It should be noted that the Court is also funded by the AU and is usually allocated more resources than the Commission.<sup>39</sup> It would also be recalled that the Court's mandate is to 'complement' the protective mandate of the Commission.<sup>40</sup> It is, therefore, difficult to appreciate why the Commission receives lesser resources when it is mandated to fulfil the twin duties of promotion and protection as opposed to the Court which has only a protective mandate. The disparity becomes even more questionable when one considers that the Commission, due to the jurisdictional restraints of the Court, is expected to perform even more protective duties than the latter. The fact that the Court, which was created to 'complement and reinforce the functions of the [Commission],'<sup>41</sup> receives far more in budgetary allocations is evidence of the latter's poor funding. A path forward is the implementation of initiatives to create a Fund for the Commission. More important, however, is an increment in the allocation of funds to the Commission especially for its duties of promotion. In addition, states may initiate a policy of funding specific promotional programmes in their respective states. This may entail the Commission publishing a list of promotional programmes it intends to undertake in each country pointing out the most important and those for which it may need sponsorship or support from the said state with the states invited to support such programmes. Such request may even be extended to private entities such as institutions

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<sup>38</sup> In the case of the Court, it must be recalled that even though it does not have a promotional mandate, it still undertakes promotional activities aimed at raising awareness about its existence and operation.

<sup>39</sup> In 2016, the Court's budget stood at over \$10 million, nearly twice the Commission's. See Decision on the Budget of the African Union for the 2016 Financial Year, Doc Assembly/AU/3(XXV), Decision no: Assembly/AU/Dec 577(XXV).

<sup>40</sup> Art 2 of the Court's Protocol.

<sup>41</sup> Preamble, African Court Protocol, para 8.

which may be willing to host seminars and conferences, corporations, and even individuals. By encouraging public sponsorship of its promotional events the Commission would not only gain in popularity but could also fuel human rights awareness as sponsors would relish the tag of 'human right supporters'.

It is instructive to note that even though this chapter is dedicated to what may be termed 'the third major challenge' to the implementation of the Charter namely institutional ineffectiveness, so far the emphasis has been on how the first two main hindrances (state commitment and practical challenges) have affected and constrained institutional effectiveness. There is a need to buttress this point given that, in the course of this research, a number of articles were examined which largely chose to criticise the perceived ineffectiveness of the Commission without an adequate appreciation of the debilitating impact of the other two identified challenges. The focus has almost entirely been on the defective protective mandate of the Commission as well as a perceived timidity and lack of courage of the Commission which has been described with such unflattering terms as 'timid' and 'lacking teeth'.<sup>42</sup> It is also interesting to note that similar attention has not been paid to practical challenges faced in promotion. Generally, articles and texts would gloss over this topic by highlighting some missions and conferences embarked on by the Commission while further criticising it for not doing enough. Needless to say, such criticisms are largely unfair as there is a limit to what even the most enthusiastic commissioners can do without appropriate support and funding. It is therefore in its production, as in this case, of an avenue for holistic and comprehensive analysis that the adopted approach of immanent critique is best appreciated. It is believed that, with its development and explication of these three main obstacles to the implementation of the Charter, this research makes an important contribution to already existing knowledge of the subject.

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<sup>42</sup> See for instance Christopher Mbazira, 'Enforcing the Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights: Twenty Years of Redundancy, Progression and Significant Strides' (2006) 6 AHRLJ 333, 343; Hansungule (23) 295.

### 7.2.2 Commission's Duty of Protection

Much has already been said of the Commission's protective mandate. In summary, the OAU set out to create a weak body that would only pass on recommendations and findings to the Assembly of Heads of States and Government. Thus, even though the Commission had a mandate to 'protect' human rights, its ability to do this was effectively watered down by the provisions of the Charter. Previous chapters have already identified how the Commission has set about ameliorating this situation and strengthening its weak protective mandate under the Charter. Firstly, it has gone on to fill in gaps in the Charter through favourable proactive interpretations.<sup>43</sup> This proactive approach was further extended to the interpretation of Charter provisions. The Commission expanded provisions on civil and political rights, socio-economic rights, and peoples' rights, and even interpreted the absence of a derogation clause from the Charter.<sup>44</sup> The Commission has gone further to adopt new rules of procedure that strengthen its enforcement mechanism through the creation of a follow-up procedure that provides for the appointment of a rapporteur for each communication and the provision for transfer of unimplemented cases to the African Court.<sup>45</sup> These steps have obviously been in response to the low rate of compliance with the Commission's decisions with some states unequivocally challenging their enforceability.<sup>46</sup> The creation of a Court seemingly put the question of enforceable decisions at the regional level to rest. However, given its jurisdictional constraints, this appears to be mainly only a solution on paper, with the practical implication that the Commission remains the sole avenue for many victims of human rights violations to lay their complaints. It is argued that failure of the individual to get enforceable remedies at either the Court or Commission is tantamount to a failure of the regional human rights system in the protection of rights. Going by the tenets of immanent critique, there is, therefore, need

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<sup>43</sup> Such gaps include hearing individual communications and reviewing State Reports. In the case of the former, the Charter does not specifically refer to individual communications only making references to 'communications other than those of state parties'. In the latter case, the Charter does not state the recipient of State Reports or what should be done after their submission.

<sup>44</sup> See Chapter 3. On the absence of a derogation clause, the Commission stated that this meant that no derogation was allowed under the Charter.

<sup>45</sup> See rr 112 & 118 of the Rules of Procedure of the African Commission 2010.

<sup>46</sup> See Chapter 5 on *Good v. Botswana*.

to address this challenge by developing practical proposals that would ensure, or at least improve, the availability of enforceable remedies to the general African populace. Accordingly, this research, in the ensuing sections, develops a proposal for making the Commission's decisions legally binding and enforceable. In addition, it also discusses other proposals for avoiding some of the weaknesses of the Commission's protective mandate. These discussions will include analyses of the role of the Assembly, cooperation between the Court and Commission, and the viability of treaty reform.

### *The Role of the Assembly*

There is no doubt that the Assembly has an important role to play in the effective discharge of the Commission's protective mandate. This is largely due to the fact that the Commission is under the overall supervision of the Assembly throughout the exercise of its protective mandate. Aside submitting reports on state complaints<sup>47</sup> and drawing the attention of the Assembly to the existence of massive violations of rights,<sup>48</sup> the Commission is also mandated to keep all measures taken under its protective mandate confidential until otherwise decided by the Assembly.<sup>49</sup> Going by these provisions, the Assembly is essentially the watchdog and enforcer of the Charter, or at least was so intended. This incidentally is a point many commentators often overlook or do not pay sufficient attention to. While bemoaning the absence of real enforcement or binding power of the Commission, some of these commentators have ended up concluding that there is no remedy under the Charter.<sup>50</sup> This, however, is not entirely correct. It is argued that, from the language of the Charter, there is provision for the 'possibility' of an effective remedy through the Assembly working on the reports and submissions of the Commission. It is important to point out that the situation would not be very different even if the Commission was given explicit powers to make binding decisions as the Assembly would still be final recourse in the event of states' failure to

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<sup>47</sup> Art 52.

<sup>48</sup> Art 58.

<sup>49</sup> Art 59.

<sup>50</sup> See for instance Vincent Nmehielle, 'Toward an African Court of Human Rights: Structuring and the Court'(2000) 6 ASICL 27, 39.

implement the decisions. This is the case with the Court which, even though its decisions are binding, is required to submit reports to the Assembly specifying the cases in which a state has not complied with its judgment.<sup>51</sup> In the end still, final recourse would be had to the Assembly, at least in the case of the most recalcitrant states.

The situation is however slightly tricky in the case of the Commission as the Assembly cannot be seen to demand the implementation of a non-binding decision. This would however not be the case were a literal reading and interpretation of the Charter to be adopted. By the provisions of the Charter, the Commission is to submit its reports along with 'such recommendations as it deems useful'.<sup>52</sup> The Charter does not state what happens thereafter leaving the option open to the Assembly to act on the finding as a decision of the Assembly which in turn would be binding on member states. This is arguably how the OAU intended for it to be.<sup>53</sup> The Union would decide which decisions to adopt and which to ignore, not necessarily having to dance to the tune of the Commission on every single occasion.<sup>54</sup> This also informs the Commission's stance, as seen in Chapter 5, that its decisions become binding after its annual report containing them is adopted by the Assembly.<sup>55</sup> This, of course, is based on the position that decisions of the AU in the form of regulations or directives (under which these should fall) are expressly binding.<sup>56</sup> This being the case therefore, it stands to reason that the Assembly can, unambiguously, give effect to the findings and decisions of the Commission. The requirement for clarity on the status of recommendations from communications is important because of the uncertainty that trails the mere adoption of Activity Reports which may be interpreted as only playing the Assembly's part in the Commission's duty of 'transmitting its report' to it.<sup>57</sup> As the intent is mainly to inform

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<sup>51</sup> Art 31.

<sup>52</sup> Art 53.

<sup>53</sup> See analysis in Chapter 6.4.1.1.

<sup>54</sup> The provisions that the Commission only forward reports and recommendations to the Assembly, rather than take decisions itself, and not publish any of its findings until authorised by the Assembly, clearly demonstrates the intention of the latter to be control of the entire process.

<sup>55</sup> Murray and Mottershaw (n 15) 353.

<sup>56</sup> Rules of Procedure of the Assembly of the Union 2002, r 33. See Viljoen, *International Human Rights Law in Africa* (n 6) 339.

<sup>57</sup> See African Charter, art 53 and arguments in Chapter 5



the Assembly of the Commission's activities, it becomes slightly presumptuous to expect that recommendations become binding by mere adoption of the Activity Reports. On this note, it becomes necessary for the Assembly to take extra steps to ensure clarity in its adopted position on the status of recommendations forwarded to it by the Commission. The Assembly, it is suggested, should take the extra step of adopting the Commission's findings, not merely as part of the latter's Activity Reports, but as distinct decisions of the Assembly thereby making them legally binding. This could take the form of normal regulations and directives of the Assembly which would ordinarily be published in the official journal of the African Union.<sup>58</sup> The added effect of this, apart from bestowing binding force, is that the Assembly will then be in a position to impose sanctions on defaulting states which would not have been possible for mere recommendations.

It is also important to point out the possible effect of this proposed practice on the actual content of recommendations. It was stated in Chapter 5 that one of the possible challenges to states' implementation of the Commission's recommendations has been the failure of the latter to provide clear and specific remedies in some cases. While this is a challenge that can, and indeed has been, progressively addressed by the Commission, it is reasonable to surmise that the adoption of the above procedure will further spur the Commissioners to carry out this role effectively. This would be done in the knowledge that such decisions would be formally tabled before the Assembly for adoption as decisions of the Assembly.

### *Imposition of Sanctions*

The imposition of sanctions is certainly one way that the Assembly can improve the effectiveness of the Commission's decisions. And, as has been shown above, this can be done if the Assembly takes the initiative of specially adopting them as AU decisions. States would no doubt fail to implement decisions whether binding or not if they do not

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<sup>58</sup> By r 34 of the Assembly's Rules of Procedure, regulations and directives become automatically enforceable 30 days after the date of their publication in the official journal of the African Union or as specified in the decision.

see any benefits of doing so or any repercussions by the way of sanctions or negative publicity. Arguing along this line, Viljoen states that the binding authority of the Commission's decisions are largely a red herring because compliance would ultimately depend on political factors such as the possible application of sanctions for non-compliance.<sup>59</sup>

The power of imposing sanctions of a 'political and economic nature' for non-compliance with decisions and policies of the AU is provided for in the AU Constitutive Act<sup>60</sup> with its Rules of Procedure<sup>61</sup> mentioning the denial of transport and communication links as possible forms of sanctions. However, the AU has hardly imposed any sanctions under the authority of this Article.<sup>62</sup> This, of course, raises concerns as member states have, at least during the era of the OAU, been in the habit of 'blatantly ignoring' the decisions adopted by OAU organs and rather adopting national policies which directly violated them.<sup>63</sup> The failure to apply sanctions, however, appears to be limited to this class of breach, that is, failure to comply with AU/OAU decisions as opposed to the other two classes of breach for which sanctions are also applied namely non-payment of budgetary contributions<sup>64</sup> and unconstitutional change of government.<sup>65</sup> While the OAU expectedly did very little in the latter case owing to the sacrosanct principles of non-intervention and interference on which it was built,<sup>66</sup> it was 'forced' to respond with sanctions to address the challenge of member states' contributions in arrears. A new Rule<sup>67</sup> was inserted in the OAU Financial Rules and Regulations to the effect that member states in arrears of contributions would not participate in OAU decisions and votes. Furthermore, in 1990, the Council of Ministers

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<sup>59</sup> Viljoen, *International Human Rights Law in Africa* (n 6) 340.

<sup>60</sup> Art 23(2).

<sup>61</sup> R 36.

<sup>62</sup> In his 2011 paper, Magliveras notes that: 'It would appear that the Assembly has never imposed any sanctions on the authority of Article 23(2). See Konstantinos D Magliveras, 'The Sanctioning System of the African Union: Part Success, Part Failure?' (Institute of Security Studies Expert Roundtable on 'The African Union: The First Ten Years', Addis Ababa, October 2011) 8.

<sup>63</sup> *ibid* 3.

<sup>64</sup> Art 23(1).

<sup>65</sup> Art 30.

<sup>66</sup> See Chapter 2.

<sup>67</sup> R 97.

decided that such states would also be deprived of the right to speak at OAU meetings and to present candidates for OAU positions. A 'Credentials Committee' was even set up for the purpose of applying these sanctions.<sup>68</sup> A number of states have accordingly been sanctioned with countries such as Liberia, Somalia, Central African Republic, Seychelles, Democratic Republic of Congo, and Guinea-Bissau remaining under long periods of sanctions despite prolonged internal crises in some of these countries. With regard to unconstitutional change of government, following the shift in the ideology of the AU,<sup>69</sup> the Peace and Security Council (PSC)<sup>70</sup> has 'been actively exercising its mandate'.<sup>71</sup> For instance, the PSC has suspended Togolese authorities from participating in the AU following an unconstitutional change of government. Similar measures have been pronounced against Mauritania,<sup>72</sup> Madagascar<sup>73</sup> and Guinea.<sup>74</sup>

The idea of the above expositions is to make the case for similar assertive steps to be taken in respect of recommendations of the Commission subsequently adopted as decisions of the Assembly. By ascribing the same level of importance to these decisions as to the above-discussed classes, the Assembly would be passing a strong positive message on the importance of human rights observance. Such a message would be stronger were the Assembly to adopt similar non-discretionary procedures<sup>75</sup> as in the

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<sup>68</sup>Council of Ministers, Resolution on Arrears of Contributions, OAU Doc CM/Res 1279 (LII) 1990. See Magliveras (n 62) 2.

<sup>69</sup> A milestone of this shift was the Lome Declaration of 2000 which created a framework for an OAU response to unconstitutional changes of government.

<sup>70</sup> The Peace and Security Council is the AU's Protocol standing decision-making organ for the prevention, management and resolution of conflicts. It was established in 2003 by the Protocol Relating to the Establishment of the Peace and Security Council of the AU.

<sup>71</sup> Viljoen, 'International Human Rights Law in Africa' (n 6) 197.

<sup>72</sup> In the case of Mauritania, the PSC called for the enforcement of an immediate travel ban on government officials. The AU also blocked the country's military government from attending its summit in Ethiopia. See VOA News, 'AU sanctions Mauritania' (2009) <http://www.voanews.com/content/a-13-2009-02-06-voa39-68768192/410760.html> accessed 10 April 2016.

<sup>73</sup> The AU imposed travel restrictions and froze assets of government officials following the failure to set up a unity government. See BBC, 'African Union acts against Madagascar's Andry Rajoelina' (2010) <http://news.bbc.co.uk/1/hi/world/africa/8574051.stm> accessed 10 April 2016.

<sup>74</sup> The AU imposed travel bans and froze assets of Guinean officials. See BBC News, 'Sanctions imposed on Guinea Junta' (2009) <http://news.bbc.co.uk/1/hi/world/africa/8333026.stm> accessed 10 April 2016

<sup>75</sup> For instance art 23(1) of the AU Assembly Constitutive Act mandates the Assembly to impose sanctions on defaulting member states. Similarly there is no political discretion in cases of unconstitutional takeover of government.

two classes discussed. This would mean that non-compliance with the Commission's decisions would be met by, at least, preliminary measures like warnings by the Assembly and subsequent measures if need be, as opposed to the present regime of silence. As done in the two classes above, a special body or committee should be assigned the role of imposing these sanctions.

It is important to note that this proposal is also applicable in the case of decisions by the African Court. It would be recalled that the Court's Protocol provides for the Court to report a failure to comply with its decisions to the Assembly without further details on what the Assembly would do in such cases. Therefore, concerns have already been raised as to how the Court would enforce its decisions in the case of states who adopt to simply wait out the process.<sup>76</sup> It is argued here that the Assembly can adopt similar steps as proposed for the Commission above.

#### *The Alternative of Using the Court's Binding Power*

While the above section has proposed what is believed to be a workable (in the spirit of the Charter) solution to the challenge of the binding power of the Commission's decisions, there are other proposed steps that are worthy of examination. One such proposal is for the Commission to refer finalised cases or those that have not been complied with to the Court with the idea that the Court would give binding force to these decisions. While similar to the first proposal, this is different to the extent that it is a legal solution as opposed to the former which could be hampered by political reticence. Already, the Commission's Rules of Procedure provide for such a relationship between the Court and Commission. By Rule 118, the Commission 'may' submit a communication to the Court where a state has not or is unwilling to comply with its recommendations or provisional measures. Unfortunately, the Commission has not cultivated a culture of submitting finalised cases to the Court. One reason for this is that the Commission has succeeded in finalising few communications in recent years and most of the respondent

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<sup>76</sup> See Carolyn S Martorana, 'The New African Union: Will it Promote Enforcement of the Decisions of the African Court of Human and Peoples' Rights?' (2008) 40 GWILR 583, 603.

states in those cases are not parties to the Court Protocol.<sup>77</sup> Another even more important concern is that the Rules appear to put the issue of referral at the discretion of the Commission, a discretion which is often not exercised in favour of the Court. Hence, the argument has been made for a mandatory requirement to ‘automatically’ refer a case to the Court after a stipulated time period of non-compliance.<sup>78</sup> Such a practice would guarantee certainty and better highlight the complementarity of the two institutions.<sup>79</sup> It would also bestow a ‘binding’ authority on the decisions.

The Commission itself is not unaware of the possible impact of the Court’s pronouncements. In the early stages of the Libyan crisis of 2011, an application was brought before the Commission regarding the serious and widespread violations of human rights in Libya. In a sense of urgency the Commission, rather than grant provisional measures, immediately referred the matter to the Court. The Commission appears to have considered the grave situation in Libya and whether its intervention would elicit any response from the government and adopted the above approach because the chances of a provisional measure eliciting a response from the government were ‘very slim taking into consideration the situation in Libya’.<sup>80</sup> While such referrals are no doubt a positive step in the development of the relationship between the two bodies, the Commission’s self-assessment is an evidence of its diminished status as occasioned by its weak protective mandate. Future discussions on the Court will further address this issue of referral of cases from the Commission.

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<sup>77</sup> Viljoen, *International Human Rights Law in Africa* (n 6) 460.

<sup>78</sup> Joseph Isanga, ‘The Constitutive Act of the African Union, African Courts and the Protection of Human Rights: New Dispensation?’ (2013) 11 SCJIL 267, 282. This practice would be similar to the Inter-American system where the Commission is required to refer a case to the Court where a party had not complied with its recommendations.

<sup>79</sup> This position is further analysed below.

<sup>80</sup> Judy Oder, ‘The African Court on Human and Peoples’ Rights’ order in respect of the situation in Libya: A watershed in the regional protection of human rights?’ (2011) 11 AHRLJ 495, 498.

### *The Alternative of Treaty Reform*

A third possible way of overcoming the shortcomings of the Commission is by reforming, through the means of an amending protocol, those parts of the Charter deemed to be inimical to the proper functioning of the Commission. There have been several arguments down the years for a reform of the Charter both as to its normative contents<sup>81</sup> and institutional framework. While such a process would appear logical, at least with regard to the Commission's protective mandate, its practicability and even necessity are in doubt. Firstly, the Commission's perceived defects have already been addressed, albeit with minimal success, in the form of the Court's Protocol. The challenges currently faced by the Court (low numbers of ratification and 'individual declarations') are likely to be encountered by the creations of any future Protocols. Secondly, as suggested in the sections above, there are already viable options for improving the force of the Commission's 'recommendations' through the Assembly and Court. What may be needed are clarifications and possibly additions to the Rules of Procedure<sup>82</sup> which, being an internal process, is less onerous than an outright revision of the Charter.

### *Further Steps to Improve Compliance*

Aside the points that have been listed above, the Commission can take more steps to strengthen implementation and enforcement of rights. Some of these are discussed below.

### *Publication of Findings*

Even with the discourse largely centred on the binding nature of the Commission's recommendations and follow-up processes as factors inhibiting enforcement, there are

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<sup>81</sup> See Christof Heyns, *Civil and Political Rights in the African Charter*(2002) in Malcolm Evans and Rachel Murray (eds) *The African Charter on Human and People's Rights: The System in Practice, 1986–2000* (CUP 2002) 853, Isanga (n 78).

<sup>82</sup> To adopt the Commission's decisions in the case of the Assembly and, in the case of the Commission, to make clearer and more mandatory provisions for referrals to the Court.

more steps that the Commission can take to boost compliance. One area that has been identified is the publication of the Commission's findings. Originally, the Commission gave a strict interpretation to Article 59 of the African Charter which preserves the confidentiality of all measures taken within the Charter until otherwise decided by the Assembly of Heads of State and Government. However, the Commission now issues its findings as an annexe to its Annual Activity Reports which are published semi-annually after their adoption by the AU Assembly.<sup>83</sup> While this is a positive development, it is noted still that the Commission has not made the best use of the media to publish its findings on decisions, to publicise instances of governmental compliance and non-compliance. Rather, press involvements in the past can largely be attributed to the efforts of NGOs.<sup>84</sup> The Commission's efforts at disseminating information through the internet must, however, be commended. The Commission's website is rich in information ranging from its recent activities, minutes of sessions, decisions on communications, Mission Reports, and State Reports. It is recommended that the Commission put in more effort to publicise instances of compliance and non-compliance by states in their human rights responsibilities. The possible impacts of such media publicity are further examined in subsequent sections.<sup>85</sup>

### *Amicable Processes*

Also identified as impeding the implementation of findings is the perception that the decisions, the decision process, and the follow-up system of the Commission are purely adversarial. From the reaction of the government of Botswana in *Good v Botswana*,<sup>86</sup> the interpretation could be made that it viewed the Commission's actions as adversarial and a threat to its sovereignty. This fear and protection of sovereignty has long characterised Africa's dealings with supranational bodies and is responsible for the many restrictions on the Commission as well as the initial reluctance to create a court.

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<sup>83</sup>Frans Viljoen and Lurette Louw, 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1994-2004' (2007) AJIL 1, 30.

<sup>84</sup> *ibid* 29.

<sup>85</sup> See 7.1.4.

<sup>86</sup> Communication 313/05.

Thus, it has been suggested that there be a shift away from confrontation and toward constructive dialogue through better communication between the involved actors and a more integrated approach to decision making and follow up.<sup>87</sup> As a follow-up to the above approach, the African Commission, perceiving of itself as only one key player in the development of human rights, must also further engage with other key political organs by finding alternative fora outside the summit in which to discuss its findings.<sup>88</sup> For instance, by Article 19 of its Protocol, the Peace and Security Council is required to seek close cooperation with the African Commission on all matters relevant to its objectives and mandate. Murray and Mottershaw<sup>89</sup> believe that the Peace and Security Council could arguably in this context examine decisions of the African Commission as indicators under their early warning system.

### **7.3 The African Court**

Created to provide a judicial human rights body for the continent and make up for some of the shortcomings of the Commission, the African Court has failed to reach its full potential. This failure, it has been shown,<sup>90</sup> is largely due to a lack of support by states in the form of ratifications and declarations allowing individual and NGO access to the Court. Given that only seven states have made the latter declaration, it means that individuals cannot bring complaints against 48 states of the Union. Also, no cases, whether by the Commission or state, can be brought against nearly half of African states who have not ratified the Court's Protocol. This outcome is quite detrimental to human rights development given that the Court was ideally poised to make an impact based on its structural and judicial capacity.

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<sup>87</sup> Murray and Mottershaw (n 15) 356.

<sup>88</sup> *ibid* 372.

<sup>89</sup> *ibid* 372.

<sup>90</sup> See Chapter 5.



It appears from the above that the obvious solution would be to encourage states to ratify the Protocol as well as make the Article 34(6) declaration. Herein, however, lies the challenge. Previous chapters have demonstrated a strong attachment to state sovereignty and general distrust of regional judicial mechanisms by African states. It has also been opined that the ECOWAS approach, which was successful in getting states to endorse similar powers for its Court, be considered for the African Court. Such efforts, it is conceded would involve a much greater number of actors and diplomacy on an even grander scale. Such rigours and machinations are obviously beyond the scope of this research. However, this step appears to be the most realistic for the development of the Court. And, while the Court may acquire more ratifications in the future, it has to be accepted that this process will be very slow and gradual. In the meantime, however, it has been readily pointed out that the Commission can act as a conduit for transferring cases to the Court due to the latter's restrictions on individual access. The following sections will analyse the extent of this means.

### **7.3.1 Indirect Access through the Commission**

The Commission's Rules of Procedure allow for it to refer a matter to the Court 'at any stage of the examination of a communication'.<sup>91</sup> This provision allows for matters that ordinarily would not come before the Court, due to restrictions under Article 34(6) to be so brought. Given the very limited ability of individuals and NGOs to institute cases and the general disinterest of states in this regard, the Commission appears to be the likeliest source of cases for the Court. It has even been suggested that the Commission has a 'paramount' role or duty to supply the Court with cases.<sup>92</sup> However, the Commission has obviously not played its part in this regard. A review of the Court's case list shows that the Commission has initiated only three cases before the Court.<sup>93</sup> It, of course, does not help that the Commission's Rules are silent as to when exactly a complaint may be

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<sup>91</sup> R 118(4).

<sup>92</sup> Oder (n 80) 510.

<sup>93</sup> Two of these were against Libya, one of which was struck out, while the other was against Kenya.

referred or submitted to the Court. That this is left entirely to the Commission's discretion would necessarily result in a few cases being referred as the Commission, it is expected, would ordinarily want to be seized with every case brought before it. It has been pointed out that such a difficulty was experienced with the Inter-American Court where it took six and four years respectively for the Inter-American Court to receive cases from its counterpart Commission.<sup>94</sup> It is such situations as this that have led to some calls for the Commission to be practically dissolved and merged with the Court.<sup>95</sup> In contesting this position, it must be clarified that referring cases to the Court is not among the Commission's chief duties, nor is ensuring a full docket for the Court. While it may help to have some guidance on when to refer cases, the Commission, as every party that can bring a case before the Court, should have a level of discretion. The case could, however, be different for complaints involving a serious breach of human rights or where the Commission's decisions have not been implemented—both of which are provided under different sections of the Rule in question, and in which circumstances the Commission has referred a couple of cases. It is therefore opined that the Commission amend its Rules to mandatorily refer cases that fall under the latter two categories. However, all other instances should ideally be left to the discretion of the Commission.

It should be pointed out that matters referred by the Commission lose their 'individual flavour' in the sense that the Commission, being the initiating party, makes all the important decisions rather than the affected individual who is not a party to the case. In other words, the individual has no control of the proceedings and cannot decide which matters are brought before the Court. Thus, while it may be ideal to have the Commission keep the Court afloat with regular referral of cases, this cannot substitute for individual/NGO initiation of complaints. Rather than go through the back door, states must be strongly persuaded to ratify the Charter and make the Article 34(6) declaration. Of course, this is easier said than done and would involve intense lobbying and political

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<sup>94</sup> Viljoen, *International Human Rights Law in Africa* (n 6) 427.

<sup>95</sup> Isanga (n 78) 301.

machinations the study of which are far beyond the scope of this research. It is, however, the most viable way forward for the African Court.

### 7.3.2 The Future of the Court

As already highlighted in Chapter 3, there is a Protocol merging the African Court with the African Court of Justice to create an African Court of Justice and Human Rights (ACJHR). Thus the African Court would operate as a chamber in this projected merged court. Unfortunately, not much has changed between the current system and that proposed under the ACJHR in terms of individual complaints as similar provisions exist in the latter's Protocol.<sup>96</sup>

It is also important to note the recent steps towards the creation of a criminal chamber in the proposed ACJHR. Such a chamber would have the competence to hear and determine matters of genocide, crimes against humanity, war crimes, corruption, and money laundering amongst others.<sup>97</sup> However, in a move that has been described as an 'own goal',<sup>98</sup> African Heads of State, in 2014, voted to grant serving Heads of State and 'senior state officials' immunity from prosecution.<sup>99</sup> The provision of immunity for serving leaders in the yet to be implemented Protocol sets the criminal court apart from other international criminal tribunals where the absence of immunity has become 'axiomatic'.<sup>100</sup> This proposal for immunity can be linked to the AU's continued grouse with the International Criminal Court especially in the latter's efforts to prosecute two serving Heads of State in Kenya and Sudan. The alleged targeting and witch-hunting of sitting African leaders by the ICC has remained one of the central themes of the AU's

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<sup>96</sup> Art 8(3) of the Protocol on the Statute of the African Court of Justice and Human Rights allow states to make a declaration accepting the competence of the Court to receive cases from individuals and accredited NGOs.

<sup>97</sup> Art 28A.

<sup>98</sup> Monica Mark, African Leaders vote themselves immunity from new human rights court, (2014) <http://www.theguardian.com/global-development/2014/jul/03/african-leaders-vote-immunity-human-rights-court>, accessed 15 April 2016.

<sup>99</sup> Beth Van Schaack, Immunity Before the African Court of Justice & Human & Peoples Rights—The Potential Outlier, <https://www.justsecurity.org/12732/immunity-african-court-justice-human-peoples-rights-the-potential-outlier/> accessed 15 April 2016.

<sup>100</sup> Ibid.

strained relationship with the ICC. This has subsequently induced the AU to take 'retaliatory' measures by conferring international criminal jurisdiction on its proposed Court.<sup>101</sup>

The move to grant immunity to serving Heads of States and senior state officials has been roundly criticised by both local and international NGOs. One major criticism is that it contradicts the spirit of the AU's Constitutive Act which contains 'broad and inspiring language' obliging the Union, amongst other responsibilities, 'to intervene in a member state...in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'.<sup>102</sup> Another criticism is that it could further encourage leaders to seize office for life, a problem the continent already grapples with.<sup>103</sup>

So far, however, the ACJHR exists only on paper with a rather long route to operationalisation given the many changes and proposals. These changes ordinarily require the ratification of legal instruments, an outcome which is 'far from certain' given that more than seven years after adoption of the merging Protocol, less than half of the required 15 states needed to bring the Protocol into force, have ratified it,<sup>104</sup> and even here it is argued that the Protocol is already defunct given the subsequent amendments to it.

The question that arises, after a glimpse into the possible future of the regional system, is whether such a future solves some of the challenges, or at least the institutional ones, that have been identified in this research. Quite clearly, the answer is no. As it appears, the regional judicial system would be starting afresh—what is a rather uncertain and

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<sup>101</sup> Ademola Abass, 'The Proposed International Criminal Jurisdiction for the African Court: Some Problematic Aspects' (2013) NILR 28, cited in Mbori H Etieno, The merged African Court of Justice and Human Rights (ACJ&HR) as a better criminal justice system than the ICC: Are we Finding African Solution to African problems or creating African problems without solutions? (2014) <http://ssrn.com/abstract=2445344> accessed 15 June 2014.

<sup>102</sup> Art 4. See Van Schaak (n 99).

<sup>103</sup> Mark (n 97).

<sup>104</sup> States that have ratified the Protocol include: Benin, Burkina Faso, Congo (Brazzaville), Libya, and Mali. See Van Schaak (n 99).

likely bleak future. Firstly, the merger of institutions and the addition of a criminal chamber do not address the key issue of whether states would cooperate with the institution through funding, ratifications, and compliance with decisions. As pointed out above, even the ACJHR Protocol has not been able to garner near substantive ratifications. In over a decade of its existence, the African Court has been able to garner just a little above half with only a handful of individual and NGO declarations under Article 34(6). There is no reason to expect that the situation would be any different in a new tripartite court. If anything, one would expect fewer ratifications and more reservations given the increased requirements as is currently the case with the African Court. It is interesting to note how easily African states adopt Protocols and create institutions and subsequently become reluctant to ratify and cooperate with them. As amply stated by one commentator: 'African states are notoriously quick to adopt treaties but excruciatingly slow to ratify them'.<sup>105</sup>

Furthermore, the issue of funding has not been sufficiently thrashed out especially given that the proposed merged court would require much more funding and resources both to carry out and promote its activities. Additionally, the proposed criminal chamber, being a novel concept would come with its own new challenges of operation and implementation. Overall, the region runs the risk of losing the gains of the present system for a future with uncertain and minimal chances of success. The various analyses of this research show that the continent is generally not ready for such a complex system especially as the much simpler institutions have been largely ineffective and yet to find their feet. To prepare itself for possible future developments, the current challenges of the system must first be addressed and resolved. Thus, a comprehensive and viable financial plan must be developed along with the firm commitment of a significant number of member states to completely support the new body. This support, as has been seen in the case of the Court, must go beyond mere adoption of Protocols and extend further into ratification, domestication, declarations allowing individual and NGO

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<sup>105</sup> Mbori H Etieno, 'The merged African Court of Justice and Human Rights as a better criminal justice system than the ICC: Are we Finding African Solution to African problems or creating African problems without solutions?' (2014) Electronic copy available at: <http://ssrn.com/abstract=2445344>.

access, and compliance with decisions. Any institutional changes that do not take these issues into consideration can be likened to changing into dry clothes while still under the rain.

#### **7.4 Improving Compliance – the Role of NGOs**

NGOs and civil society have long been considered as beneficial for the promotion of human rights. International NGOs, like Amnesty International and Human Rights Watch, have grown a reputation for drawing attention to human rights violations and calling on states to abide by their human rights obligations. In the African case, NGOs have also been noted to contribute significantly to the enforcement of rights. The contribution of NGOs comes in different forms. These include promotion of human rights through sensitisation, education, and investigation of cases of abuse or violations. They can also be in the form of applying pressure on key actors to perform their functions. The Commission has, for instance, been said to be held accountable in practice more consistently by NGOs than by the AU.<sup>106</sup>

There is also no denying the important role that NGOs have to play in the protective mandate of the institutions. This they do by bringing cases and complaints before the necessary bodies and seeing that decisions are complied with. NGOs have often been known to follow up on decisions of the Commission, ensuring through mass campaigns and media sensitisation, that state parties comply.<sup>107</sup>

Aside lobbying states to enforce decisions, NGOs have also played institutional roles in volatile areas with limited statehood. Studies have revealed the far-reaching effect of NGOs in the Democratic Republic of Congo, a conflict-ridden state with dilapidated institutions. Despite its raging conflict and failing institutions, local courts in Eastern Democratic Republic of Congo remained active and, since 2006, produced an

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<sup>106</sup> Viljoen, *International Human Rights Law in Africa* (n 6) 383.

<sup>107</sup> See for instance the case of *John Modise v Botswana*, Communication 97/93\_14AR.

extraordinary number of judicial decisions convicting perpetrators of sexual and gender-based violence owing largely to the influence of NGOs.<sup>108</sup>

The next sections will highlight previous achievements of NGOs with the aim of demonstrating the need for policies that would promote their growth and development in the continent and, by implication, improve their engagement and contribution towards solving some of the challenges facing the African human rights system. These previously identified problems include lack of cooperation and political will by member states, economic and cultural challenges, and institutional ineffectiveness.

#### **7.4.1 NGOs and States**

The ability of NGOs to persuade or even coerce cooperation from states cannot be overemphasised. Given the indifference that often greets the required performance of their duties, states need that extra push to fulfil them. One ready tool of the NGOs in achieving this aim is media publicity.

It is clear that African states are generally averse to negative publicity against their regimes especially in the area of human rights. It would be recalled, for instance, that the Charter provides for secrecy of 'all measures' taken by the Commission until otherwise decided by the Assembly.<sup>109</sup> Even the report on the activities of the Commission is not to be published until it has been 'considered' by the Assembly. These provisions are no doubt to exercise a measure of control over what gets into the public sphere about findings of violations against states. This is because negative human rights reports diminish the reputation of states internationally and could often disqualify them from receiving financial aid and other international benefits. It is by publicising violations and even lack of cooperation from certain states, that pressure may be mounted on these states to comply. As the Commission cannot adequately perform this role owing

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<sup>108</sup> Milli Lake, 'Organizing Hypocrisy: Providing Legal Accountability for Human Rights Violations in Areas of Limited Statehood' (2014) 58(2) ISQ 515.

<sup>109</sup> Art 59.

to political and financial constraints (aside the restrictive provisions of the Charter), the baton is necessarily passed on to NGOs. Such an important task as this should however not be left to randomness. NGOs with observer status should devise a comprehensive policy for coordinated publicity of both the activities of the Commission and violations by states.

NGOs' ability to influence state compliance is not limited to cases of violations. As demonstrated in the process of the adoption and ratification of the Supplementary Protocol to the ECCJ, NGOs can also play a crucial role in influencing states to embark on otherwise committing initiatives. As pointed out in Chapter 6, this Supplementary Protocol of the ECCJ introduced novel features such as direct access by individuals, open-ended legal norms, and non-exhaustion of domestic remedies. One of the main reasons for states' acceptance of these features was attributed to intense lobbying by NGOs.<sup>110</sup> While not discounting efforts already made in that regard, it could yield positive fruits for NGOs in conjunction with the African Court, to launch a concerted massive programme aimed towards encouraging ratification of the Court's Protocol and Article 34(6) declarations. The main idea that can be gleaned from the above is that the institutions need to form more purposive partnerships with the NGOs aimed at achieving set goals. These partnerships could even extend into more robust promotional activities given the financial constraints faced by the institutions in this regard.

Another area that NGOs can play a crucial role is in situations of 'serious or massive violations'. According to the Charter, the Commission is to draw the attention of the Assembly to special cases involving a series of serious violations of rights and make factual reports on them accompanied by findings and recommendations.<sup>111</sup> Of course one would expect the Assembly to act quickly on these reports of serious violations. Unfortunately, the Assembly has often met these reports with inaction such that the

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<sup>110</sup> Lake (n 108).

<sup>111</sup> Art 58.



practice has gone into abeyance.<sup>112</sup> The role of an effective NGO network would be to bring these situations into focus and pile pressure on the AU to act on them. Fortunately, however, there have been positive developments in the area of interventions and peacekeeping through the creation of the peace and security architecture with the PSC fast becoming the first port of call in such instances.<sup>113</sup>

#### **7.4.2 NGOs and the Logistics Challenge**

Practical challenges like the lack of resources and cultural impediments have been identified as some of the main obstacles to the implementation of the Charter. Naturally, NGOs should and have stepped in to cushion the effect on both the states and institutions. In the area of culture, NGOs have tirelessly sought to create awareness on such harmful practices as female genital cutting, child marriages, and forced labour.<sup>114</sup>

The importance of NGOs is more pronounced in societies where there is a near total failure of governance and the rule of law as NGOs have been known to step 'into the void left by weak or dysfunctional states'.<sup>115</sup> A good example is that of the Democratic Republic of Congo which, despite sectarian crises and derelict institutions, was able to maintain local courts and the judicial process owing largely to the efforts of NGOs.<sup>116</sup> A brief narration of the events is necessary to grasp the important role played by NGOs in the conflict.

On New Year's Day 2011, violence escalated in the Congolese eastern town of Fizi. A group of civilians had attacked and killed the bodyguard of one Lieutenant Kifaru Alexis for firing a shot at a store-tender who had refused his lieutenant access to a female customer in his shop. Enraged by violence and death of one of his soldiers, Lieutenant

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<sup>112</sup> Rachel Murray, 'massive or serious violations under ACHPR: A comparison with the Inter-American and European Mechanism QHR 109, 128.

<sup>113</sup> By r 80 of the Commission's Rules of Procedure, the Commission is required to draw the attention of the PSC to cases of emergency.

<sup>114</sup> For instance the case of the NGO 'Tostan' described in Chapter 6.

<sup>115</sup> Viljoen, *International Human Rights Law in Africa* (n 6) 571.

<sup>116</sup> See Lake (n 108).

Colonel Mutuare Kibibi drafted officers to round up those responsible. Following instructions, hundreds of soldiers descended on the town wreaking havoc, looting houses, assaulting locals and raping women and children. At least seventy local women and children were confirmed to have been violently raped and tortured by Congolese soldiers in a matter of hours. Even though atrocities like this were not unusual in conflict-ridden Congo, the ensuing response was surprising. Despite a domestic court system in disrepair and an overwhelming lack of judicial resources allocated by the central government, in just six weeks a full investigation had been carried out and Lieutenant Colonel Kibibi and ten of his officers were arrested, tried, and convicted for sexual assaults carried out against nearly 100 civilian women. They were found guilty of civil, criminal, and international crimes of terrorism, rape, forced imprisonment, sexual brutality, sexual torture, and inhumane sexual acts amongst others—a judgment that combined elements of Congolese civil, criminal, and military law with the most up-to-date international human rights protections regarding SGBV.<sup>117</sup>

The distinctive attribute of the above case was the speed and effectiveness of the judicial process in such a failed and volatile state as Congo. Since the start of the Second Congo War in 1998, the death toll has been estimated to be between three to five million people, representing the single greatest loss of life in any conflict since the Second World War.<sup>118</sup> Armed militias had killed and wreaked havoc in a battle of supremacy and there was no single central authority over the entire Congo region. It was thus surprising that such a swift and effective process could be launched to remedy the abuse occasioned by the invasion of Fizi by Lieutenant Colonel Kibibi's men. Lake attributes this effectiveness to the rise of local and international NGOs and transnational actors who have exploited the gaps in authority and 'assumed some of the basic functions of governance' to create a society where human rights are enforced.

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<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

Even in states with functioning governments and institutions, NGOs can help in curbing practices that militate against human rights by collaborating with local authorities and getting them to amend perceived obnoxious practices. The importance of developing allies among customary legal officials has been identified in the area of women's rights where there are many entrenched traditional attitudes towards women. This application of customary legal rules has been identified as the most significant barrier to altering practices that do not conform with the rights of women.<sup>119</sup> By identifying with local authorities, NGOs can initiate a process of adaptation. Such adaptation could take the route of FGM in some Kenyan communities, as highlighted in Chapter 6, where alternative circumcision rites were introduced to replace old traditions. Under the new procedure arrived at through communal dialogue and consensus, the people within these communities agreed to do away with the physical mutilation of the woman's body during the traditional female circumcision rites while retaining other harmless aspects of the circumcision rites.<sup>120</sup> Such concessions as this can hardly be achieved solely through legal processes such as the passing of statutes. This is proven by comparing results in other countries that passed FGM legislation without the accompanying interactions at the local level. Several African countries that had banned FGM had been unable to enforce such laws. Other countries that had taken strong steps to prosecute offenders had merely succeeded in driving the practice underground.<sup>121</sup> These experiences, it is argued, show that formal legislative enactments alone cannot change pervasive cultural attitudes. There usually is a need for collaboration and sensitisation—a role which is effectively played by NGOs.

### **7.4.3 NGOs and the Regional Institutions**

The Commission continues to work with a network of NGOs many of whom have observer status with it. Some of the basic roles of the NGOs include drawing the

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<sup>119</sup> Angela Banks, 'CEDAW, Compliance, and Custom: Human Rights Enforcements in Sub-Saharan Africa' (2008) 32 FILJ 781, 795

<sup>120</sup> Bonny Ibhawoh, 'Between culture and constitution: Evaluating the cultural legitimacy of human rights in the African State' (2000) 22(3) HRQ 838, 859

<sup>121</sup> *ibid* 857

attention of the Commission to violations of the Charter, bringing communications on behalf of individuals, monitoring compliance with the Charter, and raising awareness of the Commission's activities. However, collaboration between the two goes even further. NGOs participate in the Commission's public sessions and submit shadow reports. Furthermore, NGOs with an observer status are required to submit a report of their activities every two years.<sup>122</sup>

The participation of NGOs is noted to have increased significantly in recent years with more than a hundred NGOs represented at each of the Commission's session.<sup>123</sup> However, this 'sizable representation' does not always translate into effective engagement such as submitting communications and shadow reports to the Commission.<sup>124</sup> While NGOs may need to improve in this aspect there is no denying that they have played a huge role in the few successes of the Commission. For instance, of the 44 decisions on the merit delivered by the Commission between 2000 and 2009, 30 of these had direct NGO involvement either as representatives, applicants and amicus.<sup>125</sup> A similar review from 2003-2007 had also found that 28 out of 48 communications had been filed by NGOs.<sup>126</sup>

With regard to the Court, NGOs need to have observer status in order to bring a matter before it. Observer status is granted by the African Commission to NGOs that meet the requirement and as of July 2016, there are 477 NGOs with such status.<sup>127</sup> It is worthy to note that this status is not bestowed solely on local NGOs. Currently, there are NGOs with observer status from 14 countries outside Africa consisting of 12 European

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<sup>122</sup> ACHPR, Network: Non-governmental organisations <<http://www.achpr.org/network/>> accessed 5 April 2016.

<sup>123</sup> Viljoen, *International Human Rights Law in Africa* (n 6) 383.

<sup>124</sup> *ibid* 298.

<sup>125</sup> NGOs acted as representatives in 30 cases, applicants in 3, and amicus in 1. See Mayer, Lloyd Hitoshi, 'NGO Standing and Influence in Regional Human Rights Courts and Commissions' (2011) 36(3) *Brooklyn Journal of International Law* 911, 934.

<sup>126</sup> Annakaun Lindblom, 'Non-Governmental Organisations in International Law' (2005) at 283 cited in Lloyd Hitoshi Mayer, 'NGO Standing and Influence in Regional Human Rights Courts and Commissions' (2011) 36(3) *BJIL* 911, 935.

<sup>127</sup> African Commission, <http://www.achpr.org/network/> accessed 27 July 2016.

countries, the United States and Brazil. Switzerland, the United Kingdom and the United States alone account for 43 NGOs.<sup>128</sup> The significance of this is that these NGOs can potentially bring cases before the Court for those countries that have made the Articles 5(3) and 34(6) declaration. This, however, has not materialised with only four applications being made to the Court by African NGOs by early 2016.<sup>129</sup> While their efforts at assisting and representing individual applicants cannot be overlooked, it is argued that NGOs can do more to bring cases before the Court and Commission.

While NGOs have certainly helped in propping up the regional system, it is clear that much more can be done to improve their contribution. Often, it is the case that just a few NGOs are responsible for most of the positive impact while the other majority make little or no contributions.<sup>130</sup> A stronger and more meaningful organisation of the NGOs aimed directly at aiding the improvement of the regional system will go a long way in ensuring its improvement and success.

## 7.5 Conclusion

As the final phase of this immanent critique, this chapter set out to analyse the major challenges impeding the functioning of the regional human rights institutions under the Charter and its Protocol as well as proposals to overcome or mitigate them. It was shown that the previously identified challenges, namely the lack of political will and financial/logistical factors, had a significant impact on the proper functioning of the institutions especially with regard to the Commission's promotional mandate. These were often in the form of lack of funding, undermanned institutions, non-implementation of decisions, and failure to ratify and support the full implementation of treaties.

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<sup>128</sup> ACHPR, NGOs with observer status, <http://www.achpr.org/network/ngo/> accessed 27 July 2016.

<sup>129</sup> African Court, <http://www.african-court.org/en/index.php/2012-03-04-06-06-00/cases-status1> accessed 5 April 2016.

<sup>130</sup> For instance, a greater proportion of the cases brought before the Commission was attributable to the role of two NGOs: the Institute for Human Rights Development in Africa and the International Centre for the Legal Protection of Human Rights. See Mayer (n 124) 394

In analysing these challenges, a number of ways for overcoming them were proposed and analysed. The chapter sought especially to devise an original approach to dealing with the twin issues of the non-binding nature of the Commission's recommendations and the failure of states to comply with them. It was contended that the weak protective mandate of the Commission could be remedied by the Assembly adopting its decisions and ensuring their implementation through a system of sanctions as applied in cases of default in budgetary contributions. Such a step would necessitate the creation of a body or committee tasked with ensuring such adoptions and removing any room for discretion or bias that would naturally arise in an Assembly session. An alternative that has been highlighted by a few writers is for the Commission/Committee to routinely refer cases to the Court for the latter to make binding pronouncements in their favour. However, this option has the drawback that many states have not ratified the Court's Protocol and therefore not amenable to its jurisdiction. Furthermore, the individual may not have all the benefits that accrue from being a party to the case and is wholly reliant on the discretion of the referring body. A number of ways were also highlighted by which the Commission could improve compliance notwithstanding the perceived status of its decisions. Some of the important tools that were identified include media publicity and the creation of a follow-up database which would be publicly accessible.

In the case of the Court, the clearest path forward was for states to ratify the Court's Protocol and make the declaration under articles 5(3) and 34(6) allowing individual and NGO access. Obviously, the states have indicated that this is not a step that they are prepared to take. Borrowing from the unique example of the ECCJ's Supplementary Protocol, the case was made for a concerted effort by NGOs, working in unison with the Court, to canvass and lobby state support. In any event, the inability of individuals and NGOs to bring cases before the Court would mean that the onus falls on the Commission and other African Intergovernmental Organisations. However, no matter the degree of zeal exercised by these bodies, it is clear that they cannot adequately substitute for direct representation nor replicate the proactivity of NGOs.

In the area of promotion, the case was made for increased funding for the Commission's promotional activities, and the allocation of a programme budget as canvassed by the Commission. It was also reasoned that, given its limited resources, the Commission could improve partnerships with states, the Court, and NGOs to work together on some of its promotional programmes. These steps could also be attempted by the Court which faces similar challenges.

Finally, the chapter examined the role of NGOs in tackling some of the challenges faced by the institutions. It was argued that an improved partnership with NGOs would result in the amelioration of some the challenges of the institutions especially with regard to promotion. While the regional system already works with nearly 500 NGOs with observer status, there is a need for more NGOs to aid in promoting and monitoring compliance. Also, the current members could improve their output given the weak resources of the institutions. The poor financial state of the institutions demands that all the players pool their resources to ensure effective implementation of the Charter. It is mostly here that NGOs are important as they can take over/fund some of the promotional programmes of the institutions which would otherwise not be carried out for lack of funds. In simpler terms, the current challenges show the need for better team spirit and cooperation. In the meantime, political will and other practical (mainly financial) challenges continue to be the main obstructions. The continent must rise up to these challenges and address them first before embarking on any further proliferation of regional judicial bodies. Failure to do this would mean that any future court, whether criminal or not, would suffer from lack of acceptance and political rejection.

## **Chapter 8**

### **8 Conclusion**

This research set out to critique the African human rights system based on its own internal standards as represented by the African Charter on Human and Peoples' Rights. The aim of the critique was to evaluate how the practice of human rights measured up to the expectations of the Charter with the purpose of highlighting and interpreting areas of discrepancies and possible paths for reform. The adoption of immanent critique in the examination and evaluation of the African human rights system was believed to offer an original and fresh approach to the general literature on the subject. The adoption of this approach has, aside allowing for new and critical perspectives, resulted in a number of findings and suggestions for improving the African human rights system both in its theory and practical application. Some of these are reviewed below.

#### **8.1 Key Findings**

The first findings related to the actual practice and implementation of the Charter by states. Overall, it was concluded that there were serious discrepancies between the theoretical standards and the system in practice. It was found that the enforcement of civil and political rights was generally characterised by state repression and brutality. Socio-economic and peoples' rights were inadequately implemented, and the application of women's rights had not met the standards of the Women's Protocol. The research identified key themes and reasons for the state of partial or non-fulfilment of states' obligations under the Charter. These were the lack of political will on the part of states, lack of human and financial resources, poor economic conditions, cultural inclinations and stereotypes, poverty, ignorance and illiteracy. These themes formed the basis for analyses in Chapter 6 which sought to understand and interpret these discrepancies. Overall, the identified obstacles were grouped into two: those occasioned



by governments' low level and commitment<sup>1</sup> and practical challenges.<sup>2</sup> This initial classification was important in demonstrating the limits of earlier works that generally attribute poor human rights enforcement solely to unwillingness on the part of governments without paying sufficient and necessary attention to the significant impediments occasioned by several practical challenges such as the lack of adequate resources, the prevalence of poverty, illiteracy and obnoxious cultures. The research demonstrated that, even if it were the case that every government was willing to optimally implement the Charter, they would generally fall short of the required standards. This was more so the case given that, as the research aptly demonstrated, the Charter's standards were ambitious going by the historical and economic situations of a majority of African states. Firstly, even though generally laudable, the Charter's position on the justiciability and non-distinctive nature<sup>3</sup> of socio-economic rights made implementation generally difficult and near impossible for a majority of African states mired in economic difficulties. Even the more economically stable countries like South Africa had found the implementation of these rights challenging. Accordingly, the African Commission has had to read the notions of 'progressive realisation' and 'availability of resources' into the Charter. In reaching this decision, the Commission noted that African countries were generally faced with the problem of poverty which rendered them incapable of providing the necessary amenities, infrastructure and resources that facilitate the full enjoyment of these rights.<sup>4</sup> It was further shown that this economic challenge was not limited to the protection of positive socio-economic and peoples' rights but also extended to negative civil and political rights. Thus, states generally lacked the necessary resources to set up adequate and well-manned structures like courts and prisons for the effective protection of basic civil and political rights. Other identified practical challenges included cases of repugnant cultural practices, illiteracy, and general ignorance of human rights by the populace as well as ignorance of the remedial resources available under the regional system.

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<sup>1</sup> Such as the reluctance to promote judicial accountability at the regional level.

<sup>2</sup> Such as lack of resources, poverty, culture and illiteracy.

<sup>3</sup> The failure to subject socio-economic rights to availability of resources is even more crucial

<sup>4</sup> *Purohit and Moore v. The Gambia*, para 84 Communication 241/01.

The findings on the inhibiting extent of these ‘practical challenges’ did not in any way diminish strong evidence of lack of cooperation and political will by member states. These were evidenced mainly by the failure of these states to implement the decisions of the Commission and to ratify the Court Protocol—including allowing individual and NGO access to Court. With regard to the decisions of the Commission, it was argued that these were not intended to be binding on states. This notwithstanding, it still behoved on member states to implement them as acts of good will and in keeping with their commitment to protecting rights under the Charter. The failure to implement a majority of these decisions was a clear testament to the lack of cooperation and political will on the part of these states. The research further demonstrated states’ lack of political will in their overall attitude to the enforcement of positive socio-economic rights. Many African constitutions still deemed these rights non-justiciable well against the spirit and intention of the Charter even though some of these constitutions were drafted after the adoption of the Charter.

The research sought to uncover the reasons for states’ reluctance to cooperate fully with the institutional system especially in the areas of complying with the Commission’s decisions, ratifying the Court’s Protocol and allowing individual complaints at the Court. The two case studies of blatant non-compliance with the Charter (Zimbabwe and Sudan) revealed that some states still placed domestic political considerations over their human rights responsibilities. This called to question their commitment to the Charter. Here, it was considered, from the arguments of some commentators, whether the theoretical standards of the Charter, including references to the judicial/quasi-judicial nature of the institutions, were mere products of lip service such that states had created and adopted these systems with no real intention of making them work. While this position had its merits, as expounded in Chapter 6, it however, appeared weak in the light of other recent occurrences to the contrary. One of these was the transformation of the Organisation of African Unity (OAU) into the African Union (AU). While the former was built on the principles of non-interference and state sovereignty, the latter initiated a

shift in ideology towards the principles of responsibility to protect and intolerance of undemocratic change of governments. Chapter 7 showed instances of the AU sanctioning government officials in the aftermath of such undemocratic upheavals. The AU had also sanctioned interventionist missions in a number of states including Burundi, Sudan, Somalia, and the Central African Republic. If anything, these developments show that African states are willing to cede some level of state sovereignty to the regional system. A more compelling example is that of the ECOWAS Community Court of Justice (ECCJ) which was given a human rights mandate even though originally created to resolve economic and cross-border issues. Even more important is that individuals and NGOs were allowed to directly institute matters before this Court without the need to exhaust local remedies—elements clearly lacking in the African Court. Furthermore, ECOWAS member states resisted efforts by the Gambia to revisit and restrict the new jurisdictions of the Court. The interesting and ironic twist is that some of these states have not made the equivalent declaration under the African Court Protocol allowing individual access. While it is impressive that five of the current seven declarations allowing individual access to the African Court are from ECOWAS countries (comprising only 15 states), there are still questions as to why the other states have not made this declaration. This research examined some of the stated factors behind the emergence of the ECCJ's Protocol. One of the adduced reasons was that human rights NGOs lobbied hard for these features especially the omission of an exhaustion of local remedies requirement. Their arguments and propositions were in turn accepted by ECOWAS officials who recognised, *inter alia*, that it was difficult for individuals to access national courts in human rights cases. It is not clear how much of a similar effort has been put into the African Court and if this would pay similar dividends as in the ECCJ. Such a project should be the task of future research on the subject. The conclusions that may be gleaned from this and other examples is that there are strong arguments against general categorisations of African states as clinging to absolute models of state sovereignty.

The research further identified institutional ineffectiveness as the third reason (in addition to the lack of cooperation by states and practical challenges) for poor implementation of the Charter. It was found that the Commission and Court had generally failed to adequately perform their duties of promotion and protection under the Charter. To a large extent, the previously identified obstacles had a huge role to play in the ineffectiveness of the institutional systems. For instance, the failure of states to comply with decisions on communications or make the declaration allowing individual access to the Court severely undermined the protective mandate of the institutions. Furthermore, that the Commission had not adequately carried out its promotional mandate was also largely down to its paucity of funds and failure of some states to play their part in promotion. Allocations from the AU to the Commission were relatively meagre such that the Commission had to rely substantially on foreign donations to carry out some of its basic functions.

The research findings have also allowed for a better assessment of current institutional reforms at the regional level. Following from its analysis of present institutional challenges, it was concluded that current proposed changes to the African Court are well off the mark and do little to address the most serious challenges facing that establishment. The proposed addition of a Criminal Chamber, while laudable in itself, could amount to overstretching member states' already thin and feeble levels of commitment and cooperation. For these proposed institutional changes to be meaningful, the continent has to first address and resolve the major challenges highlighted in this research.

## **8.2 Recommendations**

In arguing and justifying the choice of the immanent critique approach, one of the points raised was that this approach required the critic to, after making the necessary analyses and comparisons between theory and practice, go further to establish grounds for reforms based on those analyses. It was found in the course of this research that such proposals and ideas, rather than being a distinct and even onerous element of the

research, flowed naturally during each stage of analysis. It is believed that this research has set a clear path for future institutional and other reforms and highlighted areas for future research on how to improve the African regional human rights system.

One area in need of practical and proactive measures is the Commission's weak protective mandate. Here it was opined that there was little need for treaty reform as a similar step in the form of the Court's Protocol had failed to attain the desired results. It was argued that the system could still be made effective without departing from the original intention of the Charter which was to give the Assembly of Heads of State and Government the mandate to oversee the enforcement of the Commission's decisions. This would entail that the Assembly take the extra step of specially and routinely adopting the Commission's recommendations as its own decisions. This improved status would mean that their implementation would be directly overseen by the Assembly and backed by possible sanctions. Such a step would necessitate the creation of a body or committee, similar to the Credentials Committee, tasked with ensuring such adoptions and removing any room for discretion or bias that would naturally arise in an Assembly session. It was established that the AU has consistently imposed sanctions in two areas of infringement namely: failure of states to make their periodic payments to the Union and the unconstitutional overthrow of government. It was opined that extending this sanction regime to instances of failure to comply with the AU's decisions, which in this case would include recommendations of the Commission, would better ensure their enforcement.

A number of ways were also highlighted by which the Commission could improve compliance notwithstanding the perceived status of its decisions. Some of the important tools that were identified include media publicity and the creation of a publicly accessible follow-up database. This was based on the finding that states generally abhor negative publicity especially those relating to violations of human rights.

In the case of the Court, it was clear from the research that the surest way to effectiveness was in the general ratification by member states and subsequent declarations allowing individual and NGO access to the Court. In the absence of these, stringent steps have to be taken to improve the case flow to the Court through the Commission and other African Intergovernmental Organisations. With regard to the former, it was suggested that steps be taken to clarify and strengthen the provisions on the referral of cases to the Court in the Commission's Rules of Procedure. It was specifically recommended that the Rules be amended to make mandatory the referral of complaints involving a serious breach of human rights or where the Commission's decisions had not been implemented.

Moving on to the practical challenges it was opined that these could be adequately countered through improved promotional methods and allocation of resources. The case was made for a comprehensive Plan of Action on promotion and human rights education involving the key human rights actors namely the states, regional human rights institutions, and civil society. Such unified Plan of Action was necessary to meet the huge deficit in knowledge or awareness of human rights and the remedies offered at both the national and regional levels. With particular reference to the Commission it was suggested that, in addition to increased allocation of funds, steps be taken to implement initiatives on creating a Fund for the Commission to enable it carry out promotional missions. In addition, states may initiate a policy of funding specific promotional programmes in their respective states. The Commission on its part may publish a list of its intended promotional programmes inviting states to support such programmes. Such a request, it was opined, could be extended to NGOs, and corporate and private entities which may be willing to host seminars and conferences and even sponsor entire promotional programmes as acts of good will.

Despite the position of the research that the implementation of the Charter, especially positive socio-economic rights, was well above the reach of most African countries, it was suggested that there still be clear and concerted efforts towards protecting these

rights according to the available resources of each state as provided by the Commission in the *Purohit* case. Also, governments should, by making these rights justiciable, subject themselves to a minimum level of judicial accountability for certain economic decisions or failure to protect these rights especially in extreme cases of violation where it can be shown that there are resources (or should have been through proper management) to tackle such infringements.

### **8.3 Implications for Future Research and Development**

It is believed that this research raises a number of implications and possible roadmaps for future research on the subject. Firstly, it has shown how an appreciation of the challenges currently facing the system is necessary for any future reforms. Unfortunately, current proposals for reform in the form of the African Court of Justice and Human Rights do not appear to take these challenges into consideration. Should such proposals proceed into fruition, then it is expected that the regional human rights system would continue to be mired in difficulties. For such proposed system to work, the challenges of the current system must first be addressed and resolved. This would entail the development of a comprehensive financial plan along with the firm commitment of a significant number of states to completely support the new body. Such support should ideally go before mere adoption and extend into ratification, domestication, and declarations allowing individual and NGO access.

One possible area for future research would be on how to get states to ratify the Court's Protocol and accept individual and NGO access to the Court. Such research would necessarily deal with issues of international politics and diplomacy. As a guide, such research may take into consideration the processes adopted in persuading ECOWAS states to accept similar propositions for the ECCJ. A different approach may be to carry out further research into the reasons for states' failure to ratify the Court's Protocol and make the declaration allowing individual access. Such a research may investigate

individual stances of states on such declarations and the reasons behind their reluctance to ratify or make the declaration.

Finally, this research has revealed the need for further discussions and research into the economic and social factors inhibiting the practice and implementation of human rights. While global efforts have no doubt been made towards curbing menaces like poverty and civil wars, it is clear that there is still room for improvement and research into just how much these occurrences and situations affect the individual's (and even group's) rights protected not only in the African Charter but also other regional and global human rights instruments.



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